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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 13.

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent,
Arkansas State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1968

No.

William L. Maxwell,

Petitioner,

v.

O. E. Bishop, Superintendent,
Arkansas State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on July 11, 1968.

Citation to Opinions Below

The opinion of the United States District Court for the Eastern District of Arkansas denying petitioner's application for a writ of habeas corpus is reported at 257 F. Supp. 710, and is set out in Appendix A hereto, pp. 1a-22a *infra*. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the denial of petitioner's application is not yet reported and is set out in Appendix A hereto, pp. 24a-55a *infra*.

Opinions at earlier stages of this proceeding are reported. The opinion of the Supreme Court of Arkansas affirming petitioner's conviction for the crime of rape and sentence of death is found *sub nom. Maxwell v. State*, 236 Ark. 694, 370 S.W. 2d 113 (1963). Opinions on disposition of an earlier application for habeas corpus are found *sub nom. Maxwell v. Stephens*, 229 F. Supp. 205 (E. D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965).

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered July 11, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether petitioner's proof that Arkansas juries have followed a systematic practice of racial discrimination in sentencing men to death for the crime of rape establishes a *prima facie* case which, in the absence of any rebuttal or explanation by the State, requires the constitutional invalidation of the death sentence imposed upon petitioner, a Negro convicted of rape of a white woman? This question is framed by a record of uncontradicted expert statistical testimony based upon an exhaustive study of the patterns of capital sentencing by Arkansas juries in rape cases. It is presented against the background of Arkansas' procedures for capital sentencing which leave unfettered and undirected discretion to the jury to bring in a verdict of death or life, and which deny the defendant a separate hearing for the presentation of evidence upon which rational sentencing choice may be based. The question subsumes the issues:

(a) Whether the courts below correctly held that the principles developed by this Court in several contexts relative to a *prima facie* showing of racial discrimination are inapplicable to proof of racial discrimination by juries in capital sentencing?

(b) Whether the showing by petitioner below did not make out a *prima facie* case which, under proper constitutional standards for the evaluation of proof, compelled a finding of racial discrimination in the absence of any rebuttal evidence?

(c) Whether the courts below correctly held that petitioner could not prevail upon an accepted showing of statewide discrimination in capital sentencing for rape, because he did not in addition prove (i) a similar pattern of discrimination in the particular *county* in which he was tried (where the cases were too few to establish a pattern), or (ii) that the particular jury which sentenced him was racially motivated?

(d) Whether the Court of Appeals correctly held that petitioner could not prevail as a matter of law on his challenge to his death sentence as discriminatorily imposed, because the consequence of his argument would temporarily leave only white defendants subject to the death penalty under present Arkansas procedures?

2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?

3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintain-

Constitutional and Statutory Provisions Involved

Statement

prohibition of cruel and unusual punishment were violated by the imposition of the death penalty for rape; and (c) that the Equal Protection Clause was violated by the systematic exclusion of Negroes from his trial jury, in particular because the jurors had been selected under Arkansas statutory procedures by reference to poll tax books in which racial identifications were required by law. The district court found that no sufficient showing of racial discrimination in capital sentencing had been made and, rejecting petitioner's other federal contentions, denied the writ. *Maxwell v. Stephens*, 229 F. Supp. 56 (E.D. Ark. 1964). The Court of Appeals for the Eighth Circuit affirmed after considering and rejecting petitioner's available evidence in support of his claim of racial discrimination in capital sentencing. This included with the statistics which he had previously presented relating to the number of Negro and white executions in Arkansas for the crime of rape since 1913, and sentencing statistics covering Garland, Pulaski and Jefferson Counties, Arkansas from January 1, 1956, to the date of petitioner's habeas corpus hearing in 1964. Petitioner had attempted to demonstrate on the basis of these statistics, by reference to the race of the defendants who had been sentenced to death and of the victims of the crimes of which they had been convicted, that there was a state-wide pattern of discriminatory capital sentencing for Negroes; but the court found, on that record, that petitioner's statistical argument was not at all persuasive." 348 F.2d 325, 330 (8th Cir. 1965).[1]

[1] Petitioner's then available evidence in support of his claim of racial discrimination was summarized in the court's opinion as set forth below:

> "The evidence as to the state at large showed that in the 49 years since 1913, 21 men have been executed for the crime of rape; that 19 of these were Negroes and two were white; that the victims of the 19 executed Negroes were white females and that the victims of the two executed whites were

B. Second Federal Habeas Corpus Proceeding

July 21, 1966 the present application for federal habeas corpus was filed, alleging that new evidence had become available since the disposition of petitioner's prior habeas appeal with respect to the claim of systematic racial discrimination in the exercise of capital sentencing discretion by Arkansas juries. Petitioner also raised two related claims not previously made: (1) That Arkansas' "single verdict" procedure for capital sentencing, under which the issues of guilt and punishment are simultaneously tried and submitted to the trial jury, is federally

> also white females. As to Garland County, for the decade beginning January 1, 1951, Maxwell's evidence was to the effect that seven whites were charged with rape (two of white women and the rape of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges, that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. With respect to Pulaski County for the same decade, there were 11 whites (two twice) and 10 Negroes charged, with the race of the victim of two whites and one Negro not disclosed. Three whites received a life sentence. One white was acquitted of rape of a Negro woman. One received a sentence on a reduced charge, two were dismissed, two cases remained pending, one was not prosecuted, and the last was executed on a conviction of murder of the Negroes, three with white victims and two with Negro victims received life. One case was dismissed, one was not arrested, two with Negro victims were sentenced on reduced charges, and one, Bailey, with a white victim, was sentenced to death. In Jefferson County eight Negroes were charged, with the cases against five dismissed, another dismissed when convicted on a murder charge, and two receiving sentences on reduced charges. Sixteen whites were charged. One was charged three times with respect to Negro victims and on two of these charges received five years suspended on a guilty plea. Two others received three year sentences. One is pending, one was executed, and the rest were dismissed. The race of four defendants was not disclosed, three of these cases were dismissed and one is pending." 18 F.2d at 180 (footnotes omitted).

"It was agreed that counsel for Maxwell will make those schedules available for the inspection of counsel for Respondent not later than August 10 and will also furnish the names and addresses of the field workers who assembled the original data in Arkansas. Not later than August 15 counsel for Respondent will advise opposing counsel and the Court as to whether, to what extent, and on what grounds he questions any individual case schedule.

"Subject to objections on the ground of relevancy and materiality, and subject to challenges to individual case schedules, Professor Wolfgang will be permitted to testify as an expert witness and to introduce his report as a summary exhibit reflecting and illustrating his opinions. Again subject to objections or challenges to individual schedules there will be no necessity for Petitioner to introduce the schedules in evidence or prove the source of the information reflected thereon or therein, or to call the individual field workers as witnesses." (Pre-Trial Conference Order, p. 4.)

When the case came on for hearing counsel for petitioner announced that no objections had been made by the respondent to any of the individual case schedules on the ground that all of the facts in the schedules are treated as though they are true, and Dr. Wolfgang's testimony is to be treated as though based upon the schedules, for the facts which are established of record. (R. 4.) Counsel stated it the basic facts on which Dr. Wolfgang's testimony and his analysis are made are treated as established for the purpose of the case. (R. 4.) Counsel for respondent and the court agreed with the statement (R. 4-5), the court stating that

be relied upon together with Dr. Wolfgang's testimony in the summary of evidence that follows.

The district court's opinion fairly summarizes the "background facts of the Wolfgang study":

> "In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc. to make a study of rape convictions in a number of southern States, including Arkansas, to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women. Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.
>
> "As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.
>
> "During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

[*] The general scope of the study, which gathered data concerning every case of conviction for rape during a 20-year period in 250 counties in eleven States, is described more fully in the affidavit of Norman G. Amaker, Esq., attached as Exhibit 2 to the petition for habeas corpus. For other descriptions, see the Memorandum and Order, dated July 18, 1966, appended to the opinion in *Maxwell v. South Carolina*, 368 F.2d 458 (4th Cir. 1966), and the opinion in *Matter of Sims and Abrams*, 389 F.2d 148 (5th Cir. 1967).

> "The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men. No convictions of white men for raping Negro women were found." (257 F. Supp. at 718, App. A, pp. 15a-16a *infra*. See also the opinion of the Court of Appeals, App. A, pp. 30a-31a *infra*.)

The design of the investigation was described by Dr. Wolfgang as a function of its objectives "to collect the appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption" (Tr. 17)—i.e., that there is racially differential imposition of the death penalty for rape in the States studied (Tr. 16-17)—and "to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements" (Tr. 17). The basic research methodology involved these several stages: (1) identification of the cases to be studied; (2) collection of data concerning the critical variables (race of defendant, race of victim, sentence imposed) in each case, and statistical analysis of the relationship between these variables; (3) collection of data concerning other variables ("control" variables) in each case, and statistical analysis of the relationship between each such variable and the critical variables (race and sentence) to determine whether the operation of the control variables could explain or account for whatever relationship might be observed between the critical variables; (4) reporting of results of the analysis. It is convenient to summarize the evidence presented to the district court under these four heads, with respect to the Arkansas study. Such a summary can

only imperfectly portray the character and range of the Wolfgang study. We respectfully invite the Court's attention to the whole record of the hearing below.

1. Identification of the Cases to Be Studied.

Data were gathered concerning every case of conviction for rape during a 20-year period (January 1, 1945 to the summer of 1965) in a representative sample of Arkansas counties (Tr. 21). Two points should be noted here.

First, because the study begins with cases of *conviction for rape*, it addresses itself at the outset to the possibility suggested by the Supreme Court of Arkansas on the direct appeal in petitioner's case, *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 113 (1963), that any showing that Negroes are more frequently sentenced to death for rape than whites might be accounted for by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. What is compared in this study is the rate of capital sentencing of Negro and white defendants *all of whom* have been convicted of rape.

Second, in order to give a valid basis for generalization about the performance of Arkansas juries, *every* case of conviction for rape in a randomly selected sample of Arkansas counties was included in the study (Tr. 62-63). The county sampling procedure was employed because resources available for the field study did not permit the gathering of data in every county in the State (Tr. 21, 107-111), and because it is "unnecessary to collect every individual case, so long as the sample is presumed to be a valid representation—a valid representative one" (Tr. 21). At Dr. Wolfgang's request, a random sample (Tr. 128) of Arkansas' 75 counties was drawn by Mr. John Monroe, a "qualified statistician" (257 F. Supp. at 718; App. A, p. 15a *infra*), with seventeen years experience in sampling

and surveys (App. A, pp. 34a-35a *infra*).[7] Testifying below, Mr. Monroe described in detail the sampling process used (Tr. 107-141) to draw counties "in such a manner that the sample counties within each state would provide a representative sampling for that state so that inferences could be drawn for each state in the sample and for the region as a whole" (Tr. 107). Nineteen counties in the State (Tr. 28, 118; 122-123; Petitioner's Exhibit P-5, appendices C, D; Petitioner's Exhibit P-7) containing more than 47 per cent of the total population of Arkansas (Petitioner's Exhibit P-4, p. 1; Tr. 130) were drawn by a "theoretically unbiased" random method (Tr. 118). See App. A, pp. 35a-36a *infra*. Mr. Monroe testified that "a sample is the procedure of drawing a part of a whole, and if this sample is drawn properly according to the law of chance, or with known probability, by examining a small part of this whole, and using the appropriate statistical methods, one can make valid inferences about the whole population from examining a small part" (Tr. 116). He concluded that his own sample of Arkansas counties "is a very reliable sample under the restrictions that we were confined to, the number of counties that could be investigated during the time allotted. In other words, for the size of the sample, the 19 counties, it was a very reliable and highly acceptable sample insofar as sampling statistics are concerned" (Tr. 118; see also Tr. 130, 132). "I would say that, as far as the sample is concerned, the inferences drawn from this sample, as described, are valid for the State of Arkansas" (Tr. 135).

(These conclusions were not questioned by the courts below, although, as we shall see, both courts were con-

[7] Mr. Monroe's qualifications appear at Tr. 104-106. His biography, in summary form, was admitted as Petitioner's Exhibit P-10 (Tr. 144-145).

verned over the circumstance that Mr. Monroe's areal sampling methods resulted in the selection of counties that lie principally in the southern and eastern portions of the State. This circumstance was apparently not thought to impugn the sample's *factual* representativeness—to the contrary, as the record shows and the district court found (257 F. Supp. at 720, App. A, p. 19a *infra*), the sampling method was "acceptable statistically"—but it was given importance by the *legal* theory of both courts that petitioner was required to show that Garland County, not the State of Arkansas as a whole, applied the death penalty for rape discriminatorily. The legal issue thus raised is one of those on which this petition for certiorari seeks review. See pp. 55-56 *infra*. What it is important to note here is simply that neither court below contested the uncontradicted factual assertions of Mr. Monroe, as an expert statistician, that conclusions drawn from data gathered in his sample counties would be valid for the State of Arkansas. See App. A, p. 35a *infra*.)

2. Data Concerning the Critical Variables (Race and Sentence) and Statistical Analysis of the Relationship Between Them.

For each individual case of conviction of rape, data were gathered as to race of defendant, race of victim, and sentence imposed (Tr. 28-30).[5] Using approved statistical techniques, analysis was performed to determine the relationship among these variables (Petitioner's Exhibit P-4,

[5] The sources from which these data, and other data relating to the individual cases of rape convictions studied, were obtained is described in detail in Petitioner's Exhibit P-3, pp. 1-6. See note 10, *infra*. Because the accuracy of all the basic data was conceded by the respondent below, see text *supra* at pp. 10-12, methods of data collection and data sources were not developed at the hearing, and Exhibit P-3 was put in merely for the information of the court.

pp. 2-4). Briefly, the analysis involved these steps: (a) erection of a mathematically testable "null hypothesis" "asserting there is no difference in the distribution . . . of the sentence of death or life imprisonment imposed on Negro or white defendants" (Tr. 30-31; see also Tr. 31-32); (b) calculation of a "theoretical or expected frequency" (Tr. 33) which represents the number of Negro defendants and the number of white defendants (or, more specifically, the number of Negro defendants convicted of rape of white victims, and of all other defendants) who would be expected to be sentenced to death if the null hypothesis (that sentence is not related to race) were valid (Tr. 32-33); (c) comparison of this "theoretical or expected frequency" with the frequency of death sentences actually observed in the collected data for each racial combination of defendants and victims; and (d) determination whether the discrepancy between the expected and observed frequencies is sufficiently great that, under generally accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested, rather than of the operation of chance within the testing process, sampling, etc. (Tr. 33-37). "If that difference reaches a sufficiently high proportion, sufficiently high number, then the assertion can be made, using again the traditional cut-off point,' that the difference is significant and could not have occurred by

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'Dr. Wolfgang explained in considerable detail the procedures by which relations among items of observed data are tested statistically for reliability, "not only in sociology and social sciences, but other disciplines as well . . . such as medical research" (Tr. 36). The basic procedure used in the present study—the chi-square method of statistical analysis and the traditional measure of statistical "significance" which treats as real observed relationships that could not have occurred more than five times out of one hundred by chance (expressed in the formula $P < .05$)—is described at Tr. 33-37, with explanation of these matters by reference to the familiar example of head-or-tail coin tossing.

chance" (Tr. 34). See App. A, pp. 30a-31a *infra*. The result of this analysis, then, is the determination whether there is a relationship or "association" between Negro defendants convicted of rape of white victims and the death sentence imposed by Arkansas juries; and if so, whether that relationship or association is "significant" in the statistical sense that the possibility of its occurrence by chance is so slight as properly to be discounted. (See Petitioner's Exhibit P-4, pp. 2-4.) (As we shall see *infra*, such a relationship, showing disproportionately frequent death sentencing of Negroes convicted of rape of white victims, was in fact established by the data.)

3. Data Concerning "Control" Variables.

Data gathering did not stop, however, with the facts of race and sentence. As explained by Dr. Wolfgang, data were collected on numerous other circumstances attending each case of conviction for rape that "were felt to be relevant to the imposition of the type of sentence" (Tr. 40). These data were sought by the exhaustive inquiries that occupy 28 pages of small type on the data-gathering form that is Petitioner's Exhibit P-2—inquiries concerning the defendant (age; family status; occupation; prior criminal record; etc.), the victim (age; family status; occupation; husband's occupation if married; reputation for chastity; etc.), defendant-victim relationship (prior acquaintance if any; prior sexual relations if any; manner in which defendant and victim arrived at the scene of the offense), circumstances of the offense (number of offenders and victims; place of the offense; degree of violence or threat employed; degree of injury inflicted on victim if any; housebreaking or other contemporaneous offenses committed by defendant; presence *vel non* at the time of the offense of members of the victim's family or others, and threats or violence employed, or injury inflicted if any,

upon them; nature of intercourse; involvement of alcohol or drugs; etc.), circumstances of the trial (plea; presentation *vel non* of defenses of consent or insanity; joinder of defendant's rape trial with trial on other charges or trial of other defendants; defendant's representation by counsel (retained or appointed) at various stages of trial and sentencing; etc.), and circumstances of post-trial proceedings if any. See App. A, pp. 31a-32a *infra*.

The district court aptly characterized these factors as "Generally speaking, and subject to certain exceptions, . . . variables . . . which reasonably might be supposed to either aggravate or mitigate a given rape" (257 F. Supp. at 718 n. 8; App. A, p. 16a *infra*). Their exhaustive scope appears upon the face of Petitioner's Exhibit P-2, and from Dr. Wolfgang's testimony: "The principle underlying the construction of the schedule [Petitioner's Exhibit P-2] was the inclusion of all data that could be objectively collected and transcribed from original source documents that were available to the investigators—the field investigators—such as appeal transcripts, prison records, pardon board records, and so forth, and whatever was generally available was included. In this sense, it was a large eclectic approach that we used for the purpose of assuring ourselves that we had all available data on these cases" (Tr. 96-97; see also Tr. 65-70). Dr. Wolfgang conceded that some data potentially pertinent to sentencing choice were not collected —for example, strength of the prosecution's case in each individual rape trial—but explained that this was because such items were not information "that we could objectively collect" (Tr. 97). See App. A, p. 32a *infra*.

The pertinency of these data to the study was that some of the many circumstances investigated, "rather than race alone, may play a more important role in the dispropor-

tionate sentencing to death of Negro defendants convicted of raping white victims" (Tr. 40).

> "These factors, not race, it could be argued, may be determining the sentencing disposition; and Negroes may be receiving death sentences with disproportionate frequency only because these factors are disproportionately frequent in the case of Negro defendants. For example, Negro rape defendants as a group, it may be contended, may employ greater violence or do greater physical harm to their victims than do white rape defendants; they may more frequently be represented at their trials by appointed rather than retained counsel, and they may more frequently commit contemporaneous offenses, or have a previous criminal record, etc." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 5.)

In order to determine whether the control variables explained or accounted for the racial disproportion in death sentencing, analysis had to be made of the relationship between each such factor for which data were available and sentence on the one hand, race on the other. Dr. Wolfgang explained that no variable could account for the significant association between Negro defendants with white victims and the death sentence unless that variable "was significantly associated with the sentence of death or life" (Tr. 41), and unless it *also* was significantly associated with Negro defendants convicted for rape of white victims (Tr. 41-42).

A variable, even though associated with such Negro defendants (i.e., found disproportionately frequently in their cases), could not furnish a non-racial explanation for their over-frequent sentence to death unless it was itself affecting the incidence of the death sentence (as evidenced by

its significant association with the death sentence). (see, e.g., Tr. 45-46); while a variable which was *not* associated with Negro defendants convicted of rape of white victims could also not explain the frequency with which they, as a class, were sentenced to death (e.g., Tr. 49-52). (See generally Petitioner's Exhibit P-4, pp. 6-7.)

4. Results and Conclusions.

Based on his study of the data gathered for the past twenty years in the State of Arkansas, Dr. Wolfgang concluded categorically that *"compared to all other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death."* (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 8, para. 3 (original emphasis).) "We found a significant association between Negro defendants having raped white victims and the disproportionate imposition of the death penalty in comparison with other rape convictions" (Tr. 52; see also Tr. 37-39). Indeed, the disparity of sentencing between Negroes with white victims and all other racial combinations of convicted defendants and victims was such that it could have occurred less than twice in one hundred times by chance (Tr. 37-38)—i.e., if race were not really related to capital sentencing in Arkansas, the results observed in this twenty-year study could have occurred fortuitously in two (or less) twenty-year periods since the birth of Christ. Thus, the Wolfgang study for the first time documents the discrimination which previously available data—not collected systematically or in a form permitting rigorous scientific analysis—could only suggest: for example, the Federal Bureau of Prisons' National Prisoner Statistics for executions during the period 1930-1962 (Petitioner's Exhibit P-6, Tr. 99-101), which disclose that more than nine times as many Negroes as whites were put to death for rape dur-

ing this period in the United States, although the numbers of Negroes and whites executed for murder were almost identical.

A considerable part of Dr. Wolfgang's testimony was addressed to the question whether this disproportion could be explained away or accounted for by the operation of other, non-racial ("control") variables. He testified that after the Arkansas data were collected, he considered and subjected to analysis every such variable or factor about which sufficient information was available to support scientific study (Tr. 56, 64-65, 78-80, 97). With respect to a substantial number of the variables investigated by the field researchers, their exhaustive exploration[19] failed to provide enough information for study. (E.g., victim's reputation for

[19] By reason of the court's pre-trial order and respondent's concession under the procedures fixed by that order that the responses recorded by the field researchers on the individual case schedules were accurate (see pp. 10-12, *supra*), petitioner did not present in any systematic fashion below testimony relating to the data-gathering procedures. The concession, of course, included the accuracy of the response "unknown" wherever that appeared on a schedule, and—as counsel for petitioner pointed out in the district court, without disagreement from respondent or the court—the response "unknown" "means that research, using the State's records and using all of the resources that we have poured into this case, is unable to make any better case than this" (Tr. 155-156).

The nature of the research effort involved is indicated by Petitioner's Exhibit P-3 (Tr. 25-27, 57), the instructions to the field researchers. Those instructions include the following, at pp. 4-6:

> "Whether the work is done by a single researcher or divided among more than one, the course of investigation of any specific case will ordinarily involve the following steps:
>
> "(1) Inspection of the county court docket books for entries relating to the case.
>
> "(2) Inspection of all other records relating to the case available at the county court: file jackets, transcripts, witness blotters, letter files, pre-sentence reports.
>
> "(3) Inspection of appellate court records in any case where appeal was taken. Appellate court records include the docket of the appellate court, its file jacket, record on appeal (if

chastity, Tr. 79.) Notwithstanding respondent's pre-trial concession of the accuracy of the field researchers' re-

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maintained on file in the appellate court), court opinion or opinions if any, and appellate court clerk's letter file.

"(4) Inspection of prison records of the defendant if he was incarcerated in a prison which maintains records.

"(5) Inspection of pardon board records in any case where the defendant submitted any application for executive clemency.

"(6) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, interview of defense counsel in the case.

"(7) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, inspection of local and area newspaper files for items pertaining to the case.

"Three general directives should be kept in mind:

"(A) We are concerned with the sentencing decision, in each case, of a particular official body at a particular time (i.e., the trial judge or jury; the pardon board). Every such body acts—can act—only on the facts known to it at the time it acts. For this reason, the "facts" of a case called for by the schedule mean, so far as possible, the facts perceived by the sentencing body. Facts which we know to have been known to the sentencing body are preferred facts, and sources which disclose them are preferred sources. (A trial transcript, where it exists, is therefore the most desirable source of facts.) Other sources are of decreasing value as the likelihood decreases that the facts which they disclose were known to the sentencing body. (A newspaper story which purports to report trial testimony, therefore, is to be preferred to one which purports to report the facts of the offense on the basis of other sources of information.)

"(B) After this survey is completed, its results will be made the basis for allegations of fact in legal proceedings. If the allegations are controverted, it will be necessary to prove them, and the proof will have to be made within the confines of ordinary evidentiary rules, including the hearsay principle, best evidence rule, etc. For this reason, sources of facts which are judicially admissible evidence to prove the facts which they disclose are preferred sources. Official records are most desirable in this dimension; then the testimony of witnesses having knowledge of the facts (for example, defense counsel), finally, secondary written sources (for example, newspapers).

sponses on the individual case schedules, including the response "unknown" where that appeared (see note 10 *supra*), counsel for respondent attempted to suggest in cross-examination of Dr. Wolfgang that these gaps in information impugned the underlying data-gathering process. Dr. Wolfgang replied:

> "the absence of information, I would be unwilling to assert is due to lack of any effort. Very diligent efforts were made by the field-investigators to collect the information—from court clerks, from police records, from prisons, from other sources available in the community—and they were instructed to follow down each piece of information, each source of information to its fullest extent, so that I have no reason to doubt that the effort was made to collect the data" (Tr. 80).

Wherever an official record or document may contain pertinent information, inspect it yourself if you can; don't take somebody's word for what is in it.

"(C) Many of the facts you need to know will have been contested in the judicial and post-judicial proceedings leading to a defendant's sentence and its execution. We have no method for resolving factual disputes or, ordinarily, for knowing how the triers of fact resolved them. As an invariable rule, then, the facts should be reported in the light most favorable to the prosecution, and most unfavorable to the defendant, in every case. If a trial transcript exists, and if it contains the testimony of the complaining witness and of the defendant, resolve all conflicts of testimony in favor of the complaining witness and report the facts as they might reasonably have been found by a jury which credited the complaining witness, drew all rational inferences from her testimony most strongly against the defendant, discredited the defendant, and refused to draw any disputable inferences in his favor. Treat all other sources in a similar fashion. In interviews with defense counsel, try to impress upon counsel that you have to have the facts as they might have appeared in the worst light for his client. In reading newspaper items which give conflicting versions of the facts, adopt the version most unfavorable to the defendant."

His testimony as a whole makes it clear that—although, as he put it: "Information is always limited" (Tr. 72)—he was confident that he had enough of it to support his conclusions. (See particularly Tr. 76-79.)

He was able to subject twenty-two "quite relevant variables" (Tr. 78)—in addition to race of defendant, race of victim, and sentence—to analysis. (See Petitioner's Exhibit P-4, Appendix A; Tr. 29, 52.) Most of these were not significantly associated with sentence, and so Dr. Wolfgang could assert categorically that they did not account for or explain the disproportionately frequent death sentencing of Negroes with white victims (Tr. 42-46, 53-54). These variables included the defendant's age, whether he was married, whether he had dependent children, whether he had a prior criminal record; the victim's age, whether she had dependent children; whether the defendant and victim were strangers or acquaintances prior to the offense; place where the offense occurred (indoors or outdoors), whether the defendant committed an unauthorized entry in making his way to that place; whether the defendant displayed a weapon in connection with the offense; degree of seriousness of injury to the victim; and the defendant's plea (guilty or not guilty), type of counsel (retained or appointed), and duration of trial (Tr. 47, 53; Petitioner's Exhibit P-4, p. 9, para. 5; Petitioner's Exhibit P-5). Two variables were shown to bear significant association with sentence: death sentences were more frequent in the cases of defendants who had a prior record of imprisonment, and in the cases of defendants who committed other offenses contemporaneously with the rape. But because these variables were not associated with race,[11] Dr. Wolfgang con-

[11] Statistical analysis of the association between these variables and race of the defendant disclosed no significant association. When defendant-victim racial combinations were considered, the

cluded that they also could not account for the fact that Negroes convicted of rape of white victims were disproportionately often sentenced to death (Tr. 47-52, 54; Petitioner's Exhibit P-4, pp. 8-9, para. 4; Petitioner's Exhibit P-5). Other variables appeared so frequently or so infrequently in the total population of cases studied that statistical analysis of them was "unnecessary and impossible": the fact that they appeared to characterize all cases (or no cases), irrespective of sentence or of racial combinations of defendant and victim, pointed to the conclusion that they were not available explanations for the relationship observed between death sentences and Negroes with white victims. These variables included the victim's reputation for chastity and prior criminal record; whether the defendant and victim had had sexual relations prior to the occasion of the rape; the degree of force employed by the defendant; whether the victim was made pregnant by the rape; and whether the defendant interposed a defense of insanity at trial (Tr. 54-55, 94-95, Petitioner's Exhibit P-5). Summarizing, Dr. Wolfgang found that no variable of which analysis was possible could account for the observed disproportionate frequency of sentencing to death of Negroes convicted of rape of white victims (Tr. 56-57). His ultimate conclusion was:

> "On the basis of the foregoing findings, it appears that Negro defendants who rape white victims have been disproportionately sentenced to death, *by reason of their race*, during the years 1945-1965 in the State of Arkansas." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, pp. 13-14 (emphasis added).)

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numbers of cases for which information was available became too small for statistical treatment, but on the basis of trend of association, Dr. Wolfgang concluded that here too there was no association of significance.

C. *The Opinions Below.*

1. The Issue of Racial Discrimination in Capital Sentencing for Rape.

Although respondent presented no evidence of any sort in rebuttal, the district court disagreed with Dr. Wolfgang's conclusions. It accepted his finding that the differential sentencing to death of Negroes with white victims. "could not be due to the operation of the laws of chance" (257 F. Supp. at 718; App. A, p. 16a *infra*); but supposed, again without any sort of evidentiary presentation by the State, that it might be due to some factor respecting which statistical analysis had not been possible, such as the issue of consent in rape cases (257 F. Supp. at 720-721; App. A, p. 21a *infra*). The Court remarked that the "variables which Dr. Wolfgang considered are objective . . . broad and in instances . . . imprecise"; that in many of the individual rape cases studied "the field workers were unable to obtain from available sources information which might have been quite pertinent"; and that "Dr. Wolfgang's statistics really reveal very little about the details" of comparative individual cases of rape. (257 F. Supp. at 720; App. A, p. 20a *infra*.) While recognizing that "the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically" (257 F. Supp. at 720; App. A, p. 19a *infra*), the court noted that the counties randomly chosen had turned out not to be evenly geographically dispersed, and not to include many counties of sparse Negro population (*ibid.*). Garland County, which was not itself included in the sample, is a county of sparse Negro population located in a portion of the State in which the sample counties fell less frequently than elsewhere. For those reasons, the district court declined to conclude that "the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punish-

ment of life imprisonment" (257 F. Supp. at 719; App. A, p. 18a *infra*)—(a subjective proposition, parenthetically, which petitioner's counsel had explicitly disavowed any intention to undertake to prove). With regard to the State of Arkansas generally, the district court thought that the "cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof" of racial discrimination (257 F. Supp. at 720; App. A, p. 19a *infra*). Placing some reliance on the language in Dr. Wolfgang's written report to the effect that the report was "preliminary" and "tentative" (257 F. Supp. at 720; App. A, p. 20a *infra*), the court concluded:

> "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statistical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that almost anything can be proved by them." (257 F. Supp. at 720; App. A, pp. 20a-21a *infra*.)

This conclusion appears to rest upon rejection of petitioner's contention that the principle of a *prima facie* showing of discrimination, developed by this Court in jury-exclusion cases and in other cases where factual proof of racially discriminatory conduct is material, applies also to the proof of racially discriminatory sentencing. Specifically, petitioner urged in the district court that a showing of racially differential treatment, made by a rigorous and exhaustive statistical study such as Dr. Wolfgang's, which concluded under accepted scientific standards that Negroes were being markedly more frequently sentenced

to death than whites, in a fashion that could not be accounted for on any other ground than race, constituted a *prima facie* demonstration of discrimination, compelling a finding of discrimination in the absence of any rebuttal or explanation by the State.[11] The district court's opinion does not expressly speak to this contention, but its findings make apparent its rejection of the *prima facie* principle. The court consistently speaks in terms of petitioner's failing to carry the burden of proof of discrimination.[12] And although, as we have seen, it accepts Dr. Wolfgang's conclusion that Negroes have been differentially sentenced to death in numbers that "could not be due to the operation of the laws of chance" (257 F. Supp. at 718; App. A, p. 16a *infra*), the court—notwithstanding total failure of the State to rebut or explain this differential—declines to find discrimination.

The Court of Appeals for the Eighth Circuit unequivocally rejected petitioner's contention "that a prima facie

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[11] "Under these circumstances, we suggest that where, first of all, a showing has been made that the death penalty is disproportionately frequently applied to Negroes and, secondly, an attempt has been made exhaustively to find every detail and every condition that will account for that discrimination, and every condition that could be analyzed was analyzed and shown not to account for that discrimination, and where your failure to account for other circumstances arises from the fact data is unavailable from state records, that we have amply made out a prima facie case." (Tr. 156; see Tr. 155-157.)

[12] "The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner.

* * *

The Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination.

* * *

the Court is simply not convinced . . ." (257 F. Supp. at 720; App. A, pp. 20a-21a *infra*.)

case of racially discriminatory imposition of the death penalty for rape in Arkansas has now been established and remains unrebutted by the State." (App. A, p. 25a *infra*; see pp. 38a-39a *infra*.) Again the rejection appears bottomed upon a holding that the *prima facie* principle is inapplicable. Dr. Wolfgang's findings, the court notes, "do not deny that generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it." (App. A, p. 41a *infra*.) Petitioner has not carried that burden, in the court's view, for several reasons. "Like the trial court, . . . although perhaps not for each and all of the reasons it advanced, we feel that the [statistical] argument does not have validity and pertinent application to Maxwell's case." (App. A, p. 40a *infra*.)

The court of appeals, in general, appears to concede the general validity of Dr. Wolfgang's methodology, and even of his conclusion that a pattern of racial discrimination has been shown. It finds that Dr. Wolfgang testified his report was "preliminary" only "in the sense that the other states for which data was being collected would be included in the final report." (App. A, pp. 33a-34a *infra*.) And the court accepts that there are "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."[11] Nevertheless the court holds, in effect, that this statistical showing of discrimination is irrelevant because it does "not show that the

[11] App. A, p. 44a, *infra*. Despite the generality of the court's language, this finding must relate specifically to the State of Arkansas. This is so because no proof was offered on this record of the results of the Wolfgang study in other States. The only evidence of record with regard to areas outside Arkansas was Petitioner's Exhibit P-6, the National Prisoner Statistics. These show raw numbers of executions for rape and murder, by race, for all the States. (See pp. 22-23, *supra*.) They purport to do no more than show that Dr. Wolfgang's conclusions for Arkansas are conformable to the national pattern.

petit jury which tried and convicted Maxwell acted in his case with racial discrimination" (App. A, p. 41a *infra;* see pp. 41a-45a *infra*):

> "[W]hatever . . . suspicion it may arose [sic] with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial." (App. A, pp. 42a-43a *infra.*)

This is so because the Arkansas statistics "do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted." (App. A, p. 40a *infra.*)

> "[W]hile it is true that it is in a sense the state which prosecutes, nevertheless the county has a character, too. . . . Yet the Garland County statistics [produced in the earlier habeas corpus proceeding] . . . afford no local support to the petitioner's statistical argument. The evidence produced at the prior hearing and at this one discloses only Maxwell as a recipient of the death penalty in Garland County for rape.
>
> ". . . [W]e are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South." (App. A, p. 42a *infra.*)

In addition, the court of appeals attacked the "legal logic" of any argument which would make it constitutionally impossible for a Negro to receive the death penalty upon conviction of rape of a white woman, while white men were still theoretically subject to the death penalty for rape. (App. A, p. 43a *infra.*) The court said that this result would itself constitute a violation of the Constitution and that "it is the law, not probabilities or possibilities, which

must afford equal protection." (App. A, p. 44a *infra*.) In all, the court concluded: "We are not certain that, for Maxwell, statistics will ever be his redemption. . . ." (App. A, p. 44a *infra*.)

2. The Issues of Unfettered Jury Discretion and of Simultaneous Trial on Guilt and Punishment.

Petitioner's related claims attacking Arkansas' capital sentencing procedure on its face were likewise rejected on the merits by the district court and the court of appeals. As to the contention that the unguided and uncontrolled discretion given juries under Arkansas law to decide the question of life or death is fundamentally lawless and unconstitutional within the principle of *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), both courts below relied on a footnote in the majority's *Giaccio* opinion: "we intend to cast no doubt whatever on the constitutionality of the settled practice in many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." (382 U.S. at 405, n. 8; see 257 F. Supp. at 717; App. A, pp. 13a-14a *infra*; App. A, pp. 48a-49a *infra*.) The court of appeals found support also in this Court's statement in *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967), that it was not there "contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case." (App. A, p. 48a *infra*.)

With respect to the claim that, where jury sentencing is authorized, the Fifth and Fourteenth Amendments require some procedure for separate adjudication of the issues of guilt and capital punishment, the district court concluded that "[w]hile some States follow that procedure, this Court does not believe . . . the Constitution requires it." (257 F. Supp. at 721; App. A, p. 22a *infra*.) The court of appeals noted that it had rejected similar arguments in *Pope* v.

United States, 372 F.2d 710, 727-30 (8th Cir. 1967), *judgment vacated on other grounds*, 392 U.S. 661 (1968), and found support again in the *Spencer* v. *Texas* opinion, 385 U.S., at 568 (1967):

> "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure." (App. A, pp. 49a-50a *infra*.)

3. The Issue of Racially Discriminatory Jury Selection Procedures.

The district court refused to consider petitioner's renewed attack on Arkansas' jury selection procedures, that is, the claim that use of racially segregated taxpayer rolls impermissibly invited the systematic exclusion of Negroes. The issue was thought to be foreclosed by petitioner's prior federal habeas corpus adjudication. (257 F. Supp. at 713; App. A, pp. 4a-5a *infra*.) The court of appeals rejected petitioner's argument on the merits, on the ground that in Maxwell's case the jurors were not *directly* selected from racially designated elector lists; instead jury lists were initially prepared independently, and only subsequently checked out against racially designated elector lists. Further, the court pointed out, in Maxwell's case there was no claim of inappropriate Negro representation on the Garland County jury list, nor any claim of Negro exclusion, and there was a Negro jury commissioner. On these grounds the court distinguished *Whitus* v. *Georgia*, 385 U.S. 545 (1967), and this Court's several decisions following *Whitus*. (App. A, pp. 50a-54a *infra*.)

REASONS FOR GRANTING THE WRIT

I.

Petitioner's Uncontradicted Proof of Racially Discriminatory Imposition of the Death Penalty on Negroes Convicted of Raping White Women, Together with the Needless Encouragement of Discriminatory Sentencing Occasioned by the Arkansas Procedure of Simultaneously Submitting the Issues of Guilt and Punishment to a Jury Without Standards to Guide its Discretion in Fixing Punishment, Requires Reversal of the Judgment Below.

Introduction

The issues raised by this petition are of enormous contemporary importance.[15] The Court is here presented for the first time with a record that is the end product of a detailed and exhaustive examination of the practical results of the procedures used in making the decision whether a man should live or die. That record graphically demonstrates the grim consequences of leaving unfettered and uninformed discretion to juries to choose between death

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[15] See *Sims* v. *Georgia*, 384 U.S. 998 (1966), where among the questions this Court granted certiorari to review was the following:

> Where a Negro defendant sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?

The case was decided on a different ground, *Sims* v. *Georgia*, 385 U.S. 538 (1967); *Sims* v. *Georgia*, 389 U.S. 404 (1967).

and lesser penalties for rape in a state which has historically practiced racial discrimination.[14]

The coincidence of laws maintaining the death penalty for rape, of procedures which allow its imposition arbitrarily, and of racial discrimination in its actual administration is not, of course, accidental. Sixteen American States retain capital punishment for rape. Nevada permits imposition of the penalty only if the offense is committed with substantial bodily harm to the victim.[15] The remaining fifteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all southern or border states.[16] The federal jurisdiction

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[14] Just recently the application of a Negro man and white woman for a marriage certificate was denied by the clerk of Pulaski County, Arkansas, on the basis of an Arkansas statute prohibiting interracial marriage. The couple was forced to go to a federal court for an order declaring the statute unconstitutional under *Loving* v. *Virginia*, 388 U.S. 1 (1967), and ordering the county clerk to entertain their application. *Higgins* v. *Peters*, U.S. District Court No. LR-68-C-176, E.D. Ark., Sept. 25, 1968.

[15] Nev. Rev. Stat. §200.363 (1967). See also §200.400 (1967) (assault with intent to rape, accompanied with acts of violence resulting in substantial bodily harm).

[16] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code §27-463 (1967 Cum. Supp.); see also §27-12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann. Tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3706 (1955); Tex. Pen.

and the District of Columbia, with its own strong southern traditions, also allow the death penalty for rape.[19] Outside the United States, rape is punishable by death only in Malawi, Taiwan, and the Union of South Africa.[20]

Between 1930 and 1962, the year in which petitioner was sentenced to die, 446 persons were executed for rape in the United States.[21] Of these, 399 were Negroes, 45 were

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Code Ann. arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960), see also §18.1-16 (attempted rape).

[19] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §22-2801 (1961).

[20] United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968), pp. 40, 86.

[21] The figures below are taken from United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 32, *Executions*, 1962 (April, 1963), which was put in evidence as petitioner's Exhibit P-6 at the habeas corpus hearing. Table 1 thereof shows the following executions under civil authority in the United States between 1930 and 1962:

MURDER

	Total	*White*	*Negro*	*Other*
Number	3298	1640	1619	39
Per Cent	100.0	49.7	49.1	1.2

RAPE

	Total	*White*	*Negro*	*Other*
Number	446	45	399	2
Per Cent	100.0	10.1	89.5	.04

OTHER OFFENSES

	Total	*White*	*Negro*	*Other*
Number	68	37	31	0
Per Cent	100.0	54.4	45.6	0.0

whites and 2 were Indians. All were executed in Southern or border States or the District. The percentages—89.5% Negro, 10.1% white—are revealing when compared to similar racial percentages of persons executed during the same years for murder and other capital offenses. Of the total number of persons executed in the United States, 1930-1962, for murder, 49.1% were Negro; 49.7% were white. For other capital offenses, 45.6% were Negro; 54.4% were white. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed

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Table 2 thereof shows the following executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by State:

	White	*Negro*	*Other*
Federal	2	0	0
Alabama	2	20	0
Arkansas	1	17	0
Delaware	1	3	0
District of Columbia	0	2	0
Florida	1	35	0
Georgia	3	58	0
Kentucky	1	9	0
Louisiana	0	17	0
Maryland	6	18	0
Mississippi	0	21	0
Missouri	1	7	0
North Carolina	4	41	2
Oklahoma	0	4	0
South Carolina	5	37	0
Tennessee	5	22	0
Texas	13	66	0
Virginia	0	21	0
West Virginia	0	1	0
	45	399	2

13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape; a ratio of better than one to eleven.

What is in question here is the essential fairness, regularity and even-handedness required by the Constitution in proceedings by which the State determines to take human life. As this Court noted in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), history and the public temper in this country today appear to have set their heads against capital punishment. There were only two executions in the United States during the calendar year 1967 and only one in 1966.[22] Most significantly, there has not been a single

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[22] United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, *Executions* 1930-1967 (June 1968), p. 1. For discussion of the decreasing trend in executions, see UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT, note 20, *supra*; SELLIN, THE DEATH PENALTY (1959), published as an appendix to American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959); MATTICK, THE UNEXAMINED DEATH (1966); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952).

In *Witherspoon* v. *Illinois*, 391 U.S. 510, 519-20 (1968), this Court noted that "in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. . . . [S]uch a jury can speak only for a distinct and dwindling minority." The opinion cited public opinion polls indicating that in 1966 approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at 84 (1967).

Concerned private and public agencies have also turned increasingly against the death penalty. The influential National Council on Crime and Delinquency recommended abolition in 1963. See 9 CRIME AND DELINQUENCY 225 (1963). The United States Department of Justice has taken the same view:

> "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitative skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its

execution for rape since 1964.[23] Rather than making the questions presented here less momentous, this trend only makes especially vivid the bitter irony of petitioner's predicament. If the death penalty, especially for rape, is to be a rarely imposed sanction, an unusual, extreme resort of our society, see, e.g., WECHSLER, *The Urge to Punish* 163-165 (1956), it is imperative that the resort be invoked only under procedures which assure against arbitrary and discriminatory fortuity, and that the men chosen to die be rationally and fairly chosen. The most solicitous judicial concern should be devoted to assure, at the least, that race plays no part in their selection.

Petitioner makes three interrelated constitutional challenges to the Arkansas procedure by which he was sentenced to death. First, he contends that the Arkansas practice which leaves "jurors free to decide, without any legally fixed standards,"[24] the question of life or death violates the basic rule of law implicit in the Due Process Clause. The potential for arbitrary and discriminatory application of the death penalty in the jury's unguided, unregulated and unreviewable discretion is exacerbated by a second characteristic of Arkansas procedure: simultane-

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resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." (Letter from then Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, House Committee on the District of Columbia, July 23, 1965, reported in New York Times, July 24, 1965, p. 1, col. 5.)

The Attorney General reiterated his stand against capital punishment when he was nominated for the post. See *N. Y. Times Magazine*, Sunday, April 2, 1967, pp. 31, 139.

[23] United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, Executions 1930-1967 (June, 1968), p. 7.

[24] *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966).

ous trial and submission to the jurors of the issues of guilt and punishment, a procedure which deprives the capital sentencing body of the sort of background information that is indispensable to any sort of rational choice, including the defendant's history and his personal statement, except at the cost of prejudice to fair trial on the guilt question and enforced waiver of the defendant's privilege against self-incrimination.[25] Thirdly, petitioner has documented the ugly results of the Arkansas procedures which he challenges. In the uncontested expert opinion of one of the country's outstanding criminologists, based upon an exhaustive, costly, and rigorous scientific study, Arkansas juries in rape cases have responded to the state-given opportunity for arbitrariness and have discriminated on grounds of race in sentencing men to death.

Neither court below considered the statistical showing of discrimination adequate as a matter of law, but we emphasize that there was no dispute on the facts; no

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[25] Similar procedures are being challenged in other cases before the Court this term. *Johnson v. Virginia*, Misc. No. 307; *McCants v. Alabama*, Misc. No. 937; *Porcella v. New Jersey*, Misc. No. 947. They are also under challenge in cases maintained on behalf of hundreds of condemned men in the lower courts, including the actions which have resulted in class stays of execution for all men under a sentence of death in the States of California and Florida. Many of these cases are collected and described in the Brief Amici Curiae of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, in *Witherspoon v. Illinois*, O.T. 1967, No. 1015, and *Bumper v. North Carolina*, O.T. 1967, No. 1016, at pp. 12-15, n. 30. Fifty-one men are affected alone by the stay in *Adderly v. Wainwright*, M.D. Fla., No. 67-298-Civ-J; eighty-three men and one woman by the stay in *Application of Satterfield*, Cal. S.C., Crim. No. 11573, and *Application of Anderson*, Cal. S.C., Crim. No. 11572.

Like Arkansas, most of the States which authorize the death penalty grant the jury absolute, arbitrary discretion to impose the death penalty in a single-verdict proceeding. Thus the lives of the vast majority of the 500 men now on death row in the United States will be affected by the Court's decision in this case.

evidence at all, much less conflicting expert opinion, was presented by the State, although it had full opportunity. Moreover, the court of appeals conceded that there were "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it." (App. A, p. 68a *infra*.) This finding surely requires the most painstaking consideration by this Court of the legal issues involved in Maxwell's case. For any such finding, impugning the fairness of administration of the death penalty—any such "suspicion . . . with respect to southern interracial rape trials as a group over a long period of time" (App. A, pp. 42a-43a *infra*)—touches at its roots a complex of our most intractable contemporary social issues.

Decisions of this Court have long recognized that violence may emanate from the state as well as from the mob, and that violence under color of law is as dangerous to the social fabric as that not cloaked with legitimate authority.* When government acts unlawfully, the simple result is contempt for law. See Mr. Justice Brandeis, dissenting, in *Olmstead v. United States*, 277 U.S. 438, 485 (1928). A second consequence, no less serious though rarely recognized, is the fostering in a society of the tendency to accept violence which is perpetrated by legitimate authority as broadly necessary and justifiable.

Execution, though carried out with the imprimatur of the state, is an extreme form of violence by government. One need not assert its illegality under all circumstances to point out that putting a man to death against his will

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* *See, e.g., Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Rochin v. California*, 342 U.S. 165 (1952); *Shepherd v. Florida*, 341 U.S. 50 (1951) (Mr. Justice Jackson, concurring). Cf. *Lankford v. Gelston*, 364 F.2d 197, 203-205 (4th Cir. 1966).

is state-sanctioned violence which may have the same significant consequences as other forms of official violence. It is in this context that this Court should decide the questions raised here of disproportionate application of the death penalty to Negroes as a class, and procedures that permit this disproportion. For if, as the available evidence demonstrates, the state is reserving a violent punishment for one racial group, then government is condoning for society in general, and for that class in particular, the most corrosive sort of discrimination in the most vicious and least pardonable form of human conduct. Many distinctions in government policy may be justified or accepted even when invidious and even by those who are members of the disfavored class. But discriminatory violence on the part of the state is a course which the group that is discriminated against can hardly be expected to accept. Unequal sentencing on the basis of race can only contribute to smoldering resentment or sterile indifference on the part of the oppressed class. The sense which many Negroes undeniably have and which the evidence here confirms, that the death penalty in rape cases is reserved for Negroes convicted of an offense in which a white woman is the victim, is part of the social and psychological constellation which produces "untoward counter reactions of violence". Cf. *Lankford v. Gelston*, 364 F.2d 197, 204 n. 7 (4th Cir. 1966) (Sobeloff, J.)

The submission which follows is firmly rooted in principles of law basic to our constitutional system. The factual showing is the product of an especially rigorous and thorough application of accepted scientific methodology. But as we see the matter, the enormous consequences in disaffection and alienation caused by such sentencing patterns as are here revealed enhance the weight and depth of the issues presented and make them as vital to society as they are to William Maxwell.

We add, finally, that this case does not come here alone. Litigations pending in the lower courts on behalf of hundreds of condemned men raise the same challenges which Maxwell now makes to the procedures under which he and they were sentenced to die. Several pending petitions for certiorari raise these points. See note 25 *supra*. But on no record of which we are aware are the consequences of the procedures so graphically displayed. Negro men condemned to death for rape are now raising Maxwell's racial discrimination point, based on the Wolfgang study, in a number of States.[27] But the approach to the study taken by the court below—skepticism regarding the validity of all statistical proof; insistence that particular counties, rather than States, be shown to discriminate; finally, the legal conclusion that even a conceded showing of racially discriminatory sentencing cannot prevail because "it is the law, not probabilities or possibilities, which must afford equal protection" (App. A, p. 44a *infra*)—doom those other men along with Maxwell. The import of the decision below is plain: racial discrimination in capital sentencing, not worked on the face of a State's statute books but none the less demonstrably by its juries, is irremediable. Thus, the Equal Protection Clause is rendered impotent to cure the Twentieth Century version of those discriminatory sentencing practices which were one of its most immediate targets,[28] and which are today one of our society's most grievous injustices. So that this result may not stand, we urge that certiorari be granted.

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[27] A number of cases in which the results of the Wolfgang study are being presented are now pending in Alabama, Florida, Georgia, Louisiana, and South Carolina. Descriptions of the study appear in *Matter of Sims and Abrams*, 389 F.2d 148 (5th Cir. 1967), and in the memorandum order of the Court of Appeals for the Fourth Circuit in *Moorer* v. *South Carolina*, 368 F.2d 458 (4th Cir. 1966).

[28] See pp. 45-47 *infra*.

A. *The Courts Below Erred in Holding That Petitioner's Proof of the Racially Discriminatory Death-Sentencing Practices of Arkansas Juries in Rape Cases Did Not Entitle Him to Relief From the Death Sentence.*

Although this Court has never expressly so held, it cannot be doubted that discriminatory application of the death penalty against Negro defendants convicted of the rape of white women would, if proved, constitute a denial to those defendants of the equal protection of the laws guaranteed by the Fourteenth Amendment. One of the cardinal purposes of the Fourteenth Amendment was the elimination of racially discriminatory criminal sentencing. The First Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to elevate the Civil Rights Act of 1866 to constitutional stature. See, e.g., tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949). The Enforcement Act of May 31, 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144, implemented the Amendment by reenacting the 1866 act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sentencing survives today as Rev. Stat. § 1977 (1875), 42 U.S.C. § 1981 (1964).

For purposes of the Fourteenth Amendment, it is of course immaterial whether a State writes on the face of its statute books: "Rape shall be punishable by imprisonment . . . , except that rape by a Negro of a white woman, or any other aggravated and atrocious rape, shall be pun-

ishable by death by electrocution," or whether the State's juries read a facially color-blind statute to draw the same racial line. Discriminatory application of a statute fair upon its face is more difficult to prove, but no less violates the State's obligation to afford all persons within its jurisdiction the equal protection of the laws. E.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (alternative ground); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Hamilton* v. *Alabama*, 376 U.S. 650 (1964) (per curiam).[39] And it does not matter that the discrimination is worked by a number of separate juries functioning independently of each other, rather than by a single state official. However it may divide responsibility internally, the State is federally obligated to assure the equal application of its laws. *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958).[40] This Court has long sustained claims of discriminatory jury exclusion upon a showing of exclusion continuing during an extended period of years, without in-

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[39] It is also immaterial whether a State imposes different penalties for classes of cases defined in terms of race, or whether it imposes a penalty of death in all cases of a given crime, subject to an option in the jury to be lenient in some racially defined subclass of the cases. The Fourteenth Amendment's obligation of equality extends not only to those "rights" which a state is federally compelled to give its citizens, but also to any benefits the State may choose to give any class of them, however gratuitously. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963).

[40] Execution by the State of the death sentence which it has given juries unlimited discretion to impose clearly provides that "interplay of governmental and private action," *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463 (1958), quoted in *Anderson* v. *Martin*, 375 U.S. 399, 403 (1964), which makes the State responsible for the discrimination. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Thus the State, the entity to which the Fourteenth Amendment applies, not Garland County, must answer for the discrimination. It should be noted moreover that in Arkansas as elsewhere, charging papers allege the commission of a crime "against the peace and dignity of the state of Arkansas" not against a given county.

quiry whether the same jury commissioners served throughout the period. See, *e.g.*, *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Bush* v. *Kentucky*, 107 U.S. 110 (1882); *Hernandez* v. *Texas*, 347 U.S. 475 (1954). Congress, when it enacted the 1866 Civil Rights Act knowing that "In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense,"[31] intended precisely by the Act, and subsequently by the Fourteenth Amendment, to disallow such "custom" as it operated through the sentences imposed by particular judges and juries.[32]

So the question for the courts below—the inevitably critical question in enforcement of this critical constitutional guarantee—is one of factual proof: whether a claimant has made a sufficient showing of racially discriminatory sentencing *in fact*. For, of course, today no State in the Nation has explicit statutory provisions fixing different criminal penaltes for different races. Discrimination is practiced as a matter of usage, in the administration of the broad sentencing discretion allowed by law. It cannot be detected by reading the text of what a State says about criminal sentences, but only by examining what the State's authorized agents *do* when they come actually to pass the judgments that send men to prison or to death. For this reason, questions relating to the method of that examination, to the procedures by which racially discriminatory sentencing may be judicially proved as the precondition of constitutional relief, become of the utmost importance. The present case raises just such questions, of general and cru-

[31] Cong. Globe, 39th Cong., 1st Sess. 1758 (4/4/1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the act).

[32] See the text of the act *supra*; see also, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1/29/1866), 1759 (4/4/1866) (remarks of Senator Trumbull).

cial application to those who would challenge sentencing practices that bear with discriminatory harshness on the Negro.

On two previous occasions—in the state courts of Arkansas, 236 Ark. 694, 701-02, 370 S.W.2d 113, 117-18, and in the federal courts, 229 F. Supp. 205, 216-17, 348 F.2d 325, 330-331—courts had held that petitioner Maxwell failed to prove his claim of racial discrimination by Arkansas juries in death sentencing for rape. On the first occasion his evidence—consisting of the available official statistics—was sparse but suggestive. On the second, when he persuaded the courts to permit subpoena of a few county court files, it was still more suggestive,[11] but not strong enough. If nothing else, petitioner's failure thus far to convince the courts by his proof demonstrates how difficult it is for Negro litigants generally, and for those without means particularly, to make "the law . . . see what all others see," *Brooks* v. *Beto*, 366 F.2d 1, 12 (5th Cir. 1966), citing *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). Now petitioner, with the aid of donated scientific resources far beyond his own financial command, has made every effort which rigorous scientific methodology could devise and an enormous, painstaking work of field research could carry out, to make "the law . . . see what all others see." Again the courts below held that this was not enough.

But the reasons given below *why* it is not enough establish, simply, that no amount of proof will ever be enough. The court of appeals was more or less explicit on the point:

[11] The evidence showed that in the three counties whose records petitioner was permitted to subpoena, Negroes were not substantially more frequently charged with or convicted of rape than whites. If that proof was projected state-wide, it gave added significance to the official figures showing that Arkansas had executed 19 Negroes and only 2 whites for rape between 1913 and 1963, see note 1 *supra*.

"We are not certain that, for Maxwell, statistics will ever be his redemption." (App. A, p. 44a *infra*.) Maxwell's proof was insufficient, both courts below held, *not* because he had failed to show convincingly that Negroes convicted of rape of white women were disproportionately frequently sentenced to death by Arkansas juries in numbers that "could not be due to the operation of the laws of chance." (257 F. Supp. at 718; App. A, p. 16a *infra*). The courts below accepted that conclusion. It was insufficient *not* because any non-chance, non-racial explanation for the notably over-frequent death sentencing of Negroes in interracial rape cases appears in the record. The State of Arkansas presented no evidence whatsoever to account for the disproportion; and not a shred of proof in the record suggests that there may exist any such explanation. And petitioner's proof was insufficient *not* because the thorough study on which he relied failed itself to make exhaustive efforts to seek out, in accepted scientific fashion, whatever evidence might disprove the inference of racial discrimination to which the disproportionate death sentencing of Negroes in interracial rape cases naturally (as well as scientifically) gives rise. The search for non-racial explanations in the data was pursued by methods and with energies which neither court below questioned.

The reasons for the failure of petitioner's showing of discrimination lie, rather, in several legal principles announced by the courts below for evaluating evidence of the sort which petitioner presented, and for adjudging petitioner's constitutional claim on a record of such evidence. These legal principles, we suggest, are erroneous, and should be reviewed and repudiated by this Court.

1. The district court threw the burden of persuasion on the factual question of discrimination fully upon the petitioner. Although its opinion does not speak directly

to the question, it thus tacitly rejected petitioner's contention that the *prima facie* evidence principle of the jury-exclusion cases applies to proof of racial discrimination in sentencing. See pp. 29-30 *supra*. The court of appeals approved this approach, insisting that "generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it" (App. A, p. 41a *infra*), and failing to accept Dr. Wolfgang's uncontradicted expert opinion of discrimination because his study did "not take every variable into account" (*ibid.*). But, as Dr. Wolfgang testified, and neither court below denied, the study did take into account every variable of which scientifically acceptable analysis was possible, upon the available data; and this was enough, in Dr. Wolfgang's expert judgment, to support his conclusion. The courts below demanded something more—apparently, the negativing of every possible, speculative non-discriminatory explanation for the extremely disproportioned death-sentencing figures.

However, this Court has stated that because of the Fourteenth Amendment's overriding purpose to secure racial equality, "racial classifications [are] 'constitutionally suspect,' . . . and subject to the most rigid scrutiny' . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). This principle has as its corollary that a sufficient initial showing of unequal treatment of the races is made, calling state procedures in question, whenever it appears that whites and Negroes are substantially disproportionately represented in groups of persons differently treated by those procedures; such a showing compels the inference that a State is drawing the racial line unless the state offers some justification in non-racial factors for the disproportion. E.g., *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958).

Nor has this *prima facie* evidence rule in cases involving racial inequality been restricted to jury discrimination cases. It has also been applied to education cases, *Chambers* v. *Hendersonville Board of Education*, 364 F.2d 189 (4th Cir. 1966);[10] *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966); health discrimination cases, *Cypress* v. *Newport News Hospital Association*, 375 F.2d 648 (4th Cir. 1967); and voter discrimination cases, *United States* v. *Duke*, 332 F.2d 759, 765-66 (5th Cir. 1964). See also *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Ogama* v. *California*, 332 U.S. 633 (1948).

Plainly a *prima facie* showing under this principle was made here.[11] Yet, with respondent having offered no rebuttal evidence, the courts below concluded, principally on the basis of supposed incompleteness in the data and of speculation concerning the effect of possible explanatory variables testable on the basis of more complete data, that discrimination was not shown. We submit this disposition was obviously wrong. Petitioner's evidence was indisputably substantial even if, as the courts below thought, factual matters which had escaped the dragnet

[10] In *Chambers*, the court said: "innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts." 364 F.2d at 192.

[11] The court "understands Dr. Wolfgang's conclusion to be that a Negro man who is convicted of raping a white woman has about a 50 per cent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands only about a 7½ per cent chance of receiving the death sentence." (257 F. Supp. at 719; App. A. p. 17a *infra*.) This, the district court agreed, was a "differential [that] could not be due to the operation of the laws of chance." (257 F. Supp. at 718; App. A. p. 16a *infra*.) Moreover, every possible explanation for the disproportion which Dr. Wolfgang's comprehensive study could identify and subject to analysis failed to account for the racial figures.

of the Wolfgang study made it less than conclusive. No reason appears why the *prima facie* evidence principle previously applied to other sorts of challenged discriminations should not be applied here. Certainly the State's resources for investigation are superior to petitioner's. A pauper, he has been forced to rely on this study whose limitations—whether or not they are significant—derived from the limitations of resources of its sponsors. The State of Arkansas hardly suffers from comparable limitations. Nor can it be thought that Arkansas' access to state records and to the personnel involved in state trials is more restricted than that of a Negro litigant attempting in a Southern State to obtain evidence relating to a claim of racial discrimination. Every justification for shifting the burden of persuasion to the State, as has been done in litigation of other issues of this sort, applies with evident force here.

2. The district court thought that it saw certain deficiencies in Dr. Wolfgang's study.[*] The court of appeals'

[*] Petitioner's contention that the district court committed manifest error both in its evaluation of the evidence and in the standard by which it judged the evidence, is discussed in detail in Petitioner's Brief on appeal to the Eighth Circuit, pp. 45-56.

Briefly, the district court declined to accept Dr. Wolfgang's findings in part because "The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner." (257 F. Supp. at 720; App. A, p. 19a *infra*.) Its reference to the "number of death sentences imposed" expressly purports to take account of the fact that, among the individual rape trials studied, several defendants who had undergone more than one trial were included more than once. However, Dr. Wolfgang himself explained that it was the number of trials, rather than the number of defendants, that is statistically important for present purposes; each occasion on which an Arkansas jury sentences a Negro defendant to death for rape of a white woman, or sentences a defendant to life in a case involving other racial combinations, is an additional indication of the manner in which the Arkansas statute is being applied

opinion, by contrast, finds no specific flaws in Dr. Wolfgang's methods or his data; indeed, it appears to concede

(see Tr. 60, 62). As for the court's concern with the number of case studies *in toto*, this ignores that the whole purpose of the statistical analysis conducted by Dr. Wolfgang was to satisfy him—as, in his expert opinion, it did—that the generalizations drawn from the data could be reliably based on the number of cases observed. The district court's ultimate conclusion was that Dr. Wolfgang's study provides only "meager material" (257 F. Supp. at 720; App. A, p. 20a *infra*) on which to base conclusions. But, at least in the absence of any countervailing evidence or sound reason to discredit Dr. Wolfgang's own confidence in his analysis, the district court lacked basis in the record for thus discrediting conclusions that Dr. Wolfgang opined without expert contradiction were adequately sustainable under accepted scientific standards.

The district court's reliance on that portion of the witness's written report which characterized his findings as "preliminary" and "tentative" is clearly erroneous. Dr. Wolfgang stated expressly several times that his report was "preliminary" only in regard to the entire eleven-State survey, not as to the State of Arkansas itself (Tr. 50, 93-94). See App. A, pp. 33a-34a *infra*.

Similarly inadequate consideration was given by the district court to the conclusions of Mr. Monroe, the expert who conducted the sampling resulting in the selection of 19 Arkansas counties to be studied. While recognizing that the "sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically" (257 F. Supp. at 720; App. A, p. 19a *infra*), the court appears to have taken its own view that the counties were not relevantly chosen. The court seemed to regard differential Negro population of the various counties of the state—a differential which it noticed judicially—as critically affecting Mr. Monroe's conclusions. But, again, there is no evidence on which to base any such reasoning; the reasoning runs counter to Mr. Monroe's uncontradicted testimony regarding methodology acceptable within his profession; surely, the district court could not judicially notice that he was wrong on such a matter.

Finally, the district court laid great stress upon its untenable supposition that a factor not explored in the Wolfgang analysis for want of sufficient data—the "issue of consent" which "[i]n cases not involving inter-racial situations . . . *may be and frequently is very real*" but which "*from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men*" (257 F. Supp. at 720; App. A, p. 21a *infra*, emphasis added)—explained the racially disproportioned death sentencing observed. This is plainly the sheerest speculation

the general validity of his study. Although the court notes that the study did "not take every variable into account" (App. A, p. 42a *infra*), of course no study could; and the court in its lengthy opinion mentions no significant variables which were omitted by the study." Instead it endorses—albeit guardedly—the conclusions of the study that capital sentencing for rape has shown discriminatory "results generally, but elsewhere, throughout the South" endorses—albeit guardedly—the conclusions of the study (App. A, p. 42a *infra*) that it gives grounds for "suspicion . . . with respect to southern interracial rape trials as a group over a long period of time." (App. A, pp. 42a-43a *infra*) and that there are "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades, in that large area of states whose statutes provide for it" (App. A, p. 41a *infra*). Vague and redundant as they are, these observations must, of course, relate to the State of Arkansas, since Arkansas is the only State concerning which the record offers any evidence to support them. See note 24 *supra*.

The Eighth Circuit's reason for rejecting petitioner's proof, then, lies apart from its refusal to apply the *prima facie* evidence principle primarily in its view that the Wolfgang study—indeed any such statistical study—can not be used to justify reversal of Maxwell's sentence because it cannot show that the particular jury which sentenced Maxwell discriminated. (See App. A, pp. 41a-42a *infra*.) No such showing was attempted by petitioner, and none could ever be possible. Subjective proof of discriminatory motivation by particular juries in particular

The Court apparently did not adopt the district court's notion, to be sure, that the accused was a potentially significant variable for which the study failed to account. It merely pointed out that in Maxwell's case there was no consent, and "what we are concerned with here is Maxwell's case and only Maxwell's case." (App. A, p. 42a *infra*.)

ular cases would be more incapable of proof even than subjective discrimination by jury commissioners or voting registrars. Where racially discriminatory behavior by those agencies is legally material, it has always been thought permissible to prove it by showing a long-standing pattern or practice of different treatment of Negroes and whites. The court of appeals erred in holding that the teachings of those cases were inapposite here.

3. The court of appeals also assigns some weight—it is unclear how much—to the circumstance that the Wolfgang study did not relate specifically to Garland County. (App. A, p. 40a *infra*.) "[W]hile it is true that it is in a sense the state which prosecutes, nevertheless the county has a character and a posture, too." App. A, p. 42a *infra*.) In this regard, it apparently approves the view of the district court (see 257 F. Supp. at 719, n. 9 and accompanying text; App. pp. 18a-19a *infra*; and see Tr. 90-91, 118-120, 122, 134-135), that it was incumbent upon petitioner to show racial discrimination by juries in Garland county, the county of his conviction, rather than by juries in the State of Arkansas as a unit. This, we submit, is a plain error of law. Its difficulty is not merely that it demands impossible proof—the number of cases in one county is never, in our experience, adequate to support statistical analysis—but that it requires irrelevant proof. It is the State of Arkansas, not Garland County, which has sentenced William Maxwell to death. It is the State, not the County, which is compelled by the Fourteenth Amendment to afford him the equal protection of the laws. It is the State whose statutes give its juries absolute discretion to send men to its electric chair. If juries in the State of Arkansas as a whole generally apply the State's vague and permissive capital punishment statute in such a manner as to effect discrimination against Negroes con-

victed of the rape of white women, the State's statute is invalid as applied to any member of the class discriminated against. The contrary holding below, we urge this Court to decide, is wrong.

4. The court of appeals concluded finally that it could not invalidate petitioner's death sentence upon statistical proof that a statute fair on its face was being discriminatorily applied, because "it is the law, not probabilities or possibilities, which must afford equal protection." (App. A, p. 44a *infra*.) Again, this is a legal, not a factual proposition, and it is clear error. It is well-established that the discriminatory application of statutes violates the State's obligation to afford all persons the equal protection of the laws no less than the application of statutes discriminatory on their face. If the constitutional guarantee of equal protection is to be preserved against "sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939), this must be the law; and findings of discriminatory application can and must be based on inferences from observed behavior. *E.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Whitus* v. *Georgia*, 385 U.S. 545, 605 n. 2 (1967). "In the matter of racial discrimination, statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir. 1962) (Brown, J.), *aff'd*, 371 U.S. 37 (1962). See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966).

However, the Eighth Circuit argued that if it once recognized that Negroes convicted of rape were being discriminatorily sentenced to death, the only remedy would be to absolve Negroes from the death penalty, leaving whites

still subject to it. This result, the court believed, would itself violate equal protection. (App. A, pp. 43a-44a *infra.*) Perhaps the short answer is that such an argument, if valid, would defeat any attempt by courts to enforce the Equal Protection clause against administrative or executive discrimination not expressly authorized by a state statute that can be invalidated *in globo.* Yet this Court was not deterred from prohibiting the discriminatory enforcement of an ordinance against Chinese in *Yick Wo* v. *Hopkins, supra,* by the circumstance that, immediately after the *Yick Wo* decision, whites but not Chinese—or, to be more precise, not *only* Chinese—could be prosecuted under the ordinance. The real point, of course, is that the premise of the court below is faulty; the dilemma posed, unreal. Once discrimination is shown the State is simply under an obligation to cease imposing the death penalty in a discriminatory fashion. A variety of remedies is open to it, ranging from elimination of the death penalty for all defendants to revision of the procedures by which the penalty is imposed so as to guard against discrimination. In any event, so soon as the fact of discrimination ceases, the State may kill whom it chooses. Arkansas' history, as shown in this record, indicates that it has almost never chosen to kill whites; but when it does, it may even-handedly kill Negroes as well.

5. The logic of the court of appeals' opinion, in short, would write an effective end to the Equal Protection Clause as a guarantor of enforceable rights in our times. We repeat the obvious: that those who discriminate today on grounds of race are the beneficiaries of considerable sophistication in the art, which has advanced since the days of the Black Codes. Racial distinctions no longer appear on the face of laws or regulations, and the practitioners of discrimination no longer overtly profess that

their principles of decision are racial—except, of course, where they rightly or wrongly believe that even professed discrimination cannot be legally thwarted, as, *e.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296 (1966). It is just this consideration, coupled with a realistic appreciation of the impossibility of extracting an admission of discrimination from the covert discriminator, that has led to this Court's development of the doctrine that a *prima facie* showing of discrimination can be made objectively and statistically.

If racial discrimination is truly to be eradicated from our public life, methods of proof must be developed and judicially accepted which appraise the consequences of race in a variety of institutional relationships—even the most complex. With deference, petitioner believes that the record before the Court in this case meets the highest standards; that the courts below committed manifest error in their appraisal of conceded facts and the legal principles which they announced as governing that appraisal; and that the questions presented by this petition therefore well merit review here by writ of certiorari.

B. *The Courts Below Erred in Holding That Arkansas' Procedure of Allowing Capital Juries Absolute, Uncontrolled and Arbitrary Discretion to Choose Between Punishments of Life or Death, Does Not Violate the Rule of Law Basic to the Due Process Clause of the Fourteenth Amendment.*

The discretion given Arkansas jurors to decide whether a man convicted of rape shall live or die is absolute, uncontrolled, and arbitrary. As the district court noted in this case:

> "It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to

> exercise its discretion [in capital sentencing] . . . and it will be assumed that no such standards are found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death." (257 F. Supp. 716; App. A, p. 11a *infra*.)[38]

Little more than this description is necessary to raise grave doubt as to the constitutionality of such a procedure. Whatever else "due process of law" may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision-making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject should not be taken but by the law of the land. This Court has long condemned a degree of vagueness in criminal statutes that "licenses the jury to create its own standard in each case," *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See *e.g.*, *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 247 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Winters* v. *New York*, 333 U.S. 507 (1948). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury arbitrariness and suasion by impermissible considerations. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); Lewis, *The Sit-In*

[38] The Court of Appeals noted that "the defense in Maxwell's rape trial requested no instructional standards." But the court made nothing of this, and clearly did not suggest that it amounted to the sort of intentional bypassing required to forfeit claims under *Fay* v. *Noia*, 372 U.S. 391 (1963), and *Henry* v. *Mississippi*, 379 U.S. 443 (1965). See App. A, p. 46a *infra*.

Cases: Great Expectations, 1963 SUPREME COURT REVIEW 401, 410; Note, 109 U. Pa. L. Rev. 67, 90 (1960), including racial considerations, see *Louisiana v. United States*, 380 U.S. 145 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965), and every other insidious urging of caprice or prejudice.

Under these decisions, it could scarcely be contended that an Arkansas statute would be valid which provided: "whosever is found condemnable in the discretion of a jury shall be guilty of an offense." Yet we submit that this suppositious statute stands no differently in light of the concerns of the Due Process Clause than the unregulated sentencing practice under which petitioner was condemned to die. The statute, it is true, deals with crime, and Arkansas' sentencing practice with punishment. But a practice that jeopardizes the integrity and reliability of the sentencing process is as unconstitutional as one that similarly affects the guilt-determining process. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Mempa v. Rhay*, 389 U.S. 128 (1967). In *Witherspoon*, 391 U.S. at 521 n. 20, this Court noted that while sentencing choices—and, in particular, the choice of life or death may be

> "different in kind from a finding that the defendant committed a specified criminal offense, . . . this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct."

Traditionally, of course, it may have been thought that "fair notice" questions were raised by regulations defining offenses but not by those prescribing punishment. Yet it is

apparent that the vice of the "whoever is found condemnable" statute has little to do with notice. The statute is bad not because a man does not know how to behave consistently with it, but because, *however he behaves, he may be arbitrarily and capriciously taken by the heels.* The precise vice inheres in unregulated jury discretion to sentence a convicted man to life or death. He too may be dealt with arbitrarily, his life extinguished for any reason or none. Surely he is, at the same time, under Arkansas' singly verdict practice, found guilty of a defined crime. That conviction, however, cannot constitutionally be given the effect of stripping him of every civil right, including the fundamental right to due process of law. E.g., *Specht* v. *Patterson*, 386 U.S. 605 (1967).

Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966), supports, if it does not compel, the conclusion that unfettered jury discretion in capital sentencing is unconstitutional. What was at issue there, as here, was a state practice governing disposition. No "fair notice" problem was involved—except, of course, the problem, noted by the Court, that it was impossible for defense counsel at trial to know what issues he was trying, as it is in a capital case tried to a jury having limitless sentencing power.[3] That decision turned squarely on the proposition that the Fourteenth Amendment forbade Pennsylvania to leave its "jurors free to decide, without any legally fixed standards," 382 U.S. at 402-403, whether

[3] The Court noted specifically that the problem of fair notice was only one of the problems with vague, standardless laws:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.*" (382 U.S. at 402-403; emphasis added.)

the degree of arbitrariness allowed a State is more liberal where grave and irremediable penalties are at stake, see *Skinner v. Oklahoma*, 316 U. S. [illegible] (1942); and none is graver or more irremediable than the sentence of death for a [illegible] offense.

Nor did the trial court on [illegible] hearing of what has been presented here, evidence showing that in fact the sentencing discretion given juries has been exercised on the ground of race explicitly forbidden by the Constitution. See pp. [illegible] supra. Petitioner contends that the arbitrary and standardless discretion afforded Arkansas juries constitutes *per se* a deprivation of his constitutional rights. But obviously, evidence that abuse has in fact occurred has considerable bearing on the issue whether a practice challenged on the grounds of lawlessness [illegible] to be capable of such challenge. See, *e. g.*, *Yick Wo v. Hopkins*, 118 U. S. [illegible] (1886); *Norris v. Maryland*, 346 U. S. 366 (1953); *Hague v. CIO*, 307 U. S. 496 (1939); *Louisiana ex rel. Seals v. State*, [illegible] (1960).

Here petitioner does not contend that the [illegible] statute forbids the exercise of discretion in sentencing [illegible] to a jury, and even as a capital case. Was [illegible] to forego the absolute and simple discretion narrowly to acquit, and subject it to [illegible] and there may [illegible] a grant of discretion within constitutionally tolerable limits. Whether the approach taken by a State such as Nevada which makes [illegible] reasonable findings of fact the indispensable condition of imposing capital punishment (see Nev. Rev. Stat. [illegible] (1961)), or the approach of a [illegible] form which has administered for judicial decision at least some of the impermissible considerations against which [illegible] cases such as *Thompson v. [illegible]*, [illegible] U. S. [illegible] (1960), or that of the Model Penal Code which [illegible] establishes prerequisite findings and enumerates

aggravating and mitigating circumstances (see American Law Institute, Model Penal Code, § 210.6 (Proposed May 4, 1962), pp. 128-129; or that of the numerous States which provide plenary review of capital jury sentencing by trial and appellate courts, would be constitutional, is not the question presented. Conceivably the goals of sentencing are complex and in designing devices for achieving them the States must have some tolerance.

But as the issue of petitioner's sentence was submitted to the jury in its sole discretion under Arkansas procedure, the attention of the jurors was directed to none of the purposes of criminal punishment, nor to any pertinent aspect or aspects of the defendant's conduct. They were not invited to consider the extent of physical harm to the prosecutrix, the moral heinousness of the defendant's acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant "*pour décourager les autres*." H. Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: as a whim, a vague caprice, or because of the color of petitioner's skin.[1] In making the determination to impose the death sentence, they acted wilfully and unreasonably, without standards and without direction. Nothing assured that there would be the slightest thread of con-

[1] The court of appeals opinion states that the jury's "choice between capital punishment and life imprisonment . . . is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is left the judge." App. A p. 11a *infra*. But apart from the obvious point that the choice between life and death is not just any sentencing choice—judges unlike laymen can be assumed to be aware of the general purposes of criminal punishment, of relevant aggravating and mitigating factors, and of factors which cannot properly be taken into consideration.

process followed the sentence they enacted and are due reasonable justification for exacting it. Cf. Skinner v. Okla. Supra. To concede the complexity and interrelation of sentencing goals, see Packer, supra, is no reason to use them as procedural wheels to turn them all. It is futile to put forward justification for a death so inflicted; there is no assurance that the infliction responds to the justification we can ascribe to it in operation. Inevitably, under such a sentencing regime, capital punishment is those few, arbitrarily selected cases where it is applied, is both unpredictable and lawless, and is shown by the record here, conventionally imposed only on the members of minority groups.

C. The Courts Below Erred in Rejecting Petitioner's Constitutional Attack Upon the Arkansas Single Verdict Procedure for the Trial of Capital Cases.

Arkansas' practice of subjecting simultaneously to the trial jury the two issues of guilt and punishment in a capital case compounds the vice of lawless jury discretion just discussed by making it virtually impossible for the jurors to exercise their discretion in any rational fashion. Under Arkansas procedure, the jury hears evidence simultaneously on the issues of guilt and punishment, and usually both issues at a single sitting. Under this procedure, there is no separate hearing on penalty apart from the criminal trial itself, and no opportunity for allocution or for the presentation of evidence in mitigation of sentence after the finding of guilt but prior to the life/death sentencing choice.

The court of appeals pointed out that no request was made of the district court for a two-stage trial. App. A, p. 40a infra. But again the court of appeals did not suggest that this fundamental to the sort of intentional bypassing required to forfeit constitutional claims as against federal habeas corpus. See note 18 supra.

a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams v. New York*, 337 U.S. 241, 247 (1949); see also *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n. 20 (1968). A *fortiori*, a jury engaged on the task of determining whether a defendant shall live or die needs much information that cannot and should not be put before it within the confines of traditional and proper limitations on the proof allowable as going to guilt or innocence. It is fair to say that the overwhelming weight of considered contemporary judgment concurs in the conclusion that, whether discretionary death sentencing be done by a judge or jury, it is the imperative condition of rational sentencing choice that the sentencer consider more information about the individual defendant than is likely or permissibly forthcoming on trial of the guilt issue. E.g., House of Commons Select Committee on Capital Punishment, Report, (H.M.S.O. 1930), para. 177; Royal Commission on Capital Punishment, 1949-1953, Report (H.M.S.O. 1953) (Cmd. No. 8932), ¶¶ 12-13, 196, 201, 207; American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959), Comment to § 201.6 at 71-76; New York State Temporary Commission on Revision of the Penal Law and Criminal Code, Interim Report (Leg. Doc. 1965, No. 8) (February 1, 1965), 15-16; H.L.A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U.L.Rev. 433, 438-439 (1957); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa.L.Rev. 1099, 1109, 1133-1139 (1953); Mueller, *Background Readings in Murder Cases*, 31 J. Crim. L., Crim. & Pol. Sci. 317, 321-327 (1940).

The single verdict procedure therefore confronted petitioner, on trial for his life, with a gruesome Hobson's choice.

Petitioner had a crucial interest—amounting, indeed, to an independent federal constitutional right; see *Skinner v. Oklahoma*, 316 U.S. 535 (1942)—that his sentence be rationally determined. The Constitution guaranteed him, also, certain procedural rights in this sentencing process: *inter alia*, "an opportunity to be heard . . . and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 610 (1967); *Mempa v. Rhay*, 389 U.S. 128 (1967). As the basis for a rational sentencing determination, he would want to present to the sentencing jurors evidence of his history, his character, his motivation, and the events leading up to his commission of the crime of which he was guilty (if he was guilty). The common law gave him a right of allocution which is an effective vehicle for this purpose, as well as for a personal appeal to the jurors, where capital sentencing is discretionary. And this Court has already recognized that allocution may in some circumstances rise to the dignity of a due process command.[43]

[43] *Hill v. United States*, 368 U.S. 424, 428-429 (1962); see *Andreas v. United States*, 373 U.S. 334, 336-337 (1963). Acting on these opinions, several circuit courts have found allocution a constitutional right. *Green v. United States*, 313 F.2d 6 (1st Cir. 1963), *cert. denied* 372 U.S. 951 (1963); *United States v. Johnson*, 315 F.2d 714 (2d Cir. 1963), *cert. denied*, 375 U.S. 971 (1964); *Behrens v. United States*, 312 F.2d 223 (7th Cir. 1962), *aff'd*, 375 U.S. 162 (1963).

The *Hill* case holds that, absent "aggravating" circumstances (368 U.S. at 429), failure of a sentencing judge to invite the defendant to exercise his right of allocution does not violate due process. But *Hill* was not a capital case, nor a case in which counsel was denied the right to present pertinent information to the sentencer, nor "a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed . . . [nor where the sentencer] was either misinformed or uninformed as to any relevant circumstances . . . [nor where it was even claimed] that the defendant would have had anything at all to say if he had been formally invited to speak." *Ibid.* In an Arkansas capital case, the following "aggravating circumstances" are prescribed: (A) the circumstances that the right of allocution has had unique historical significance in capital

But to exercise his right of allocution before verdict on the guilt issue, petitioner was required to forego his constitutional privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Griffin* v. *California*, 380 U.S. 609 (1965). He was required to take the stand and be subjected to cross-examination that could incriminate him." *United States* v. *Jackson*, 390 U.S. 570 (1968), holds that the exercise of the Fifth Amendment privilege in criminal trials may not be penalized or needlessly burdened. Simultaneous submission to the jury of the guilt and death

cases, see *Couch* v. *United States*, 335 F.2d 519, 521 (D.C. Cir. 1956) (opinion of Judge Fahy); *Coleman* v. *United States*, 334 F.2d 558, 566 (D.C. Cir. 1964) (opinion of Judges Burger and McGowan); (B) the circumstance that in capital cases matters which may affect the sensitive discretion of the jury in its life-death choice are traditionally viewed with a stricter eye to possibilities of prejudice than are other matters in the criminal process; see *People* v. *Hines*, 390 P.2d 398, 37 Cal. Rptr. 622 (1964); (C) the circumstance that Arkansas' single verdict procedure "affirmatively" denies a defendant his opportunity to address the jury on sentence, within the meaning of *Hill*, *supra*; (D) the circumstance that, for the reasons set out above in text, a jury making a capital sentencing choice on no other information than the trial of the guilt issue allows is invariably "either misinformed or uninformed" within the meaning of *Hill*; (E) the circumstance that, under the Arkansas procedure, not only is the defendant denied the right to make a personal statement without giving up his constitutional privilege against self-incrimination, but he is similarly denied the right to have his counsel supply evidence on the sentencing issue without incurring the risks of prejudice on the guilt issue, see the *Johnson* and *Behrens* cases cited, *supra*; also *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955); *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957).

" Even apart from cross-examination, allocution before verdict of guilt destroys the privilege, for much of the value of the defendant's personal statement to his sentencer derives from its spontaneity; see *Green* v. *United States*, 365 U.S. 301, 304 (1961) (opinion of Mr. Justice Frankfurter). This same spontaneity—unguided by the questions of counsel—leaves the defendant impermissibly unprotected as he appears before a jury which has not yet decided on his guilt. *Cf. Ferguson* v. *Georgia*, 365 U.S. 570 (1961).

penalty issues, results in just such a needless burden—needless because the State has ample means to avoid it by, for example, a bifurcated jury trial, judge sentencing, or the elimination of the death penalty. Further, *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), where the question was whether a defendant might be obliged either to give up what he believed to be a valid Fourth Amendment claim or "in legal effect, to waive his Fifth Amendment privilege against self-incrimination," points the way to condemnation of the "undeniable tension" between constitutional rights presented here. That case held it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Ibid.*

But the single-verdict practice which petitioner challenges presents grave problems in addition to this conflict between the right of allocution and the privilege. If the defendant seeks to present to the jury evidence of his background and character, apart from his own statement, the prosecution may counter with evidence of the defendant's bad character, including evidence of unrelated crimes. The prohibition which ordinarily keeps this sort of evidence from the trial jury sitting to determine the issue of guilt is "one of the most fundamental notions known to our law," *United States* v. *Reno*, 324 F.2d 582, 587 (2d Cir. 1963), arising "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence," *Lovely* v. *United States*, 169 F.2d 386, 389 (4th Cir. 1948); see *Marshall* v. *United States*, 360 U.S. 310 (1959). Allowing the trial jury access to unfavorable background information, however pertinent to the issue of punishment, and however clearly limited by jury instructions to that use, may itself amount to a denial of due process of law. Compare *United States ex rel. Scoleri* v. *Hammiller*, 310 F.2d

720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963), with *United States ex rel. Rucker v. Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963). In any event, the possibility that the background information will be strongly prejudicial forces a defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence." AMERICAN LAW INSTITUTE, MODEL PENAL CODE, *supra* at 64.

In this aspect the practice of simultaneous submission of guilt and sentence to a jury is much akin to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. The New York practice was, of course, struck down in *Jackson v. Denno*, 378 U.S. 368 (1964), where the Court recognized that joint jury trial of the two issues prevented either from being "fairly and reliably determined." 378 U.S. at 389; see *id.* at 386-391. One fault of the practice was that:

> "... an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination. ... Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence." (378 U.S. at 389 n. 16).

And see *Bruton v. United States*, 391 U.S. 123 (1968).

[*] To the extent that petitioner's argument on this branch of his case draws sustenance from the radiations of the rule of *Jackson v. Denno*, text, *supra*, his argument is not weakened by *Spencer v. Texas*, 385 U.S. 554 (1967), cited by the court of appeals. The *Spencer* decision dealt with the Texas procedure for determining the punishment decreed under its recidivist statutes, pursuant to which a jury trying a criminal defendant was informed by a

It is in precisely the same manner that single verdict capital sentencing tends either to make trials of guilt

reading of the indictment that the defendant had been convicted of prior crimes, and evidence was introduced in support of these allegations during the course of trial. The procedure was attacked on the ground that it unduly prejudiced the defendant on the issue of guilt, in violation of the Due Process Clause. In rejecting this attack, the Court held, *inter alia*, that *Jackson* v. *Denno* did not require a two-stage jury trial for invocation of a state's habitual offender statute and that "the emphasis [in *Jackson*] was on protection of a specific constitutional right and the *Jackson* procedure was designed as a specific remedy to insure that an involuntary confession was not in fact relied upon by the jury." 385 U.S., at 565.

But no more "specific constitutional right" can be imagined than that which prohibits the state's taking of petitioner's life pursuant to a sentencing process which is irrational because sentencing choice is made without information essential to the choice. *Skinner* v. *Oklahoma*, *supra*; *Specht* v. *Patterson*, *supra*. And though the Court in *Spencer* read *Jackson* as not broadly requiring a two-stage jury proceeding whenever evidence of prior crimes which might possibly prejudice the jury's determination of the guilt issue is presented at the trial (because of the justifications generally accepted for permitting such evidence—see 385 U.S., at 560-61), Jackson's holding that "a general jury verdict [is] not a reliable vehicle for determining the issue of voluntariness [of a confession] because jurors might have difficulty in separating the issue of voluntariness from that of guilt or innocence," 385 U.S. at 565, is unimpaired. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Simmons* v. *United States*, text, *supra*. That, by analogy, applies with equal, if not greater force to the jury's determination of the issues of guilt and sentence in a capital case. The "specific remedy" for reliably determining these issues enjoined on the courts by *Jackson*, reinforced by *Sims* v. *Georgia*, 385 U.S. 538 (1967), and endorsed by *Spencer* is that of separate consideration of the issues.

Moreover, there are crucial differences between the situation presented here and that presented by the practice challenged in *Spencer*. First, the sole claim urged by the petitioners in *Spencer* was that the introduction of prior crime evidence before jury verdict on the guilt issue unduly prejudiced the defendant on that issue (385 U.S. at 559, 567) and was therefore unconstitutional *per se*. Petitioner's submission here differs. The effect of the single verdict sentencing procedure which he challenges is to confront a capital defendant with the grim specter of having to sacrifice one or another of his precious constitutional rights, either allocution

unfair—by forcing the defense to present evidence potentially helpful on the punishment issue and prejudicial on the issue of guilt—or to produce the unfair result that men are sentenced to death "upon less than all of the relevant evidence" if the defense declines to take that risk.[9] Not only, in such a case, is the jury empowered to act arbitrarily, see pp. 58-65, *supra*; it is virtually compelled to do so for want of information upon which nonarbitrary choice can be based. In short, although the Due Process Clause guarantees a defendant a fair trial both on the issue of guilt, *e.g., Irvin* v. *Dowd*, 366 U.S. 717 (1961), and on the issue of punishment, *e.g., Townsend* v. *Burke*, 334 U.S. 736 (1948), the single-verdict procedure employed in petitioner's case deprives him of the one or the other. Cf. *Fay* v. *Noia*, 372 U.S. 391, 440 (1963).

As the question in *United States* v. *Jackson*, 390 U.S. 570 (1968), was whether the provision of the federal kidnaping statute reserving the infliction of the death sentence to the exclusive province of the jury "needlessly encourages" guilty pleas and jury waivers and therefore

or self-incrimination. By whatever choice he makes, he is prejudiced on either the issue of guilt or sentence; and he must decide—with his life at stake—which kind of prejudice to invite. Cf. *Whitus* v. *Balkcom*, note 16, *infra*. Also, while in *Spencer* the juries were given limiting instructions to guide their consideration of the prior crime evidence on the guilt issue, the jury's discretion in sentencing choice under Arkansas law is not limited or regulated in any way. See pp. 58-65, *supra*. Hence there is more than "the possibility of some collateral prejudice" (385 U.S. at 564) which the Court in *Spencer* thought not of sufficient gravity to condemn the procedure there attacked.

Finally, the Arkansas procedure has been shown on this record to have resulted in a pattern of racially discriminatory death sentencing. This goes far toward satisfying the concern of the *Spencer* court over the lack of a convincing showing of prejudice.

[9] Such a "grisly," hard, Hobson's choice is itself so unfair as to violate due process. See *Whitus* v. *Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964).

"needlessly chill[s] the exercise of basic constitutional rights," 390 U.S., at 582, 583, so the question here is whether the simultaneous trial of guilt and punishment *needlessly encourages* the waiver of the right to remain silent or *needlessly chills* the right to put in evidence relevant to rational sentencing and the right of allocution. "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U.S., at 582. That question, put in focus by the ready availability of alternative modes of procedure not involving this dilemma—such as the split-verdict procedure now in use in a number of jurisdictions[47] and uniformly recommended by modern commentators, see *Frady* v. *United States*, 348 F.2d 84, 91 n. 1 (D.C. Cir. 1965) (McGowan, J.); cf. *United States* v. *Curry*, 358 F.2d 904, 914 (2d Cir. 1965)—presents at the least a significant issue of the fairness required by due process in trials where life is at stake, which this Court should grant certiorari to determine.[48]

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[47] A man tried on a capital charge in California, Connecticut, New York, Pennsylvania and Texas receives first a hearing on innocence or guilt; then, after a finding of guilt, a separate hearing on the issue of punishment. In view of the availability of this alternative "split-verdict" mode of procedure which does not entail the deprivation of petitioner's rights, the constitutionally unfair single-verdict procedure used in petitioner's case can obviously not be defended on the ground of necessity. Petitioner, of course, does not contend that the State is constitutionally compelled to have a bifurcated trial. The bifurcated trial is only one of the alternatives available to the State which do not entail the needless burden on capital defendants' constitutional rights here complained of.

[48] Cf. *Witherspoon* v. *Illinois*, 391 U.S. 510, 520 n. 18 (1968), noting that if a defendant could establish that a jury which was representative with respect to penalty was *not* representative with respect to guilt,

> "the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing

II.

The Courts Below Erred in Rejecting Petitioner's Attack Upon the Arkansas Scheme of Juror Selection, Which Provides the Opportunity for Racial Discrimination Proscribed by *Whitus* v. *Georgia*.

At the time of petitioner's trial, Arkansas law required the selection of jurors from electors, defined as those who had paid their county poll tax; and the names of such persons were required to be kept in a bound poll tax book where they were designated by race. Moreover, the jury list itself indicated race, 348 F.2d 332. These circumstances, we submit, bring this case within the ambit of *Whitus* v. *Georgia*, 358 U.S. 545 (1967); and the Eighth Circuit's rejection of the controlling force of *Whitus* merits review here.

Whitus held that a Georgia system of jury selection was unconstitutional because it provided the opportunity for racial discrimination in the juror-selection process. As the Court noted, the claim made in *Whitus* was "that Georgia's system of jury selection resulted in the systematic exclusion of Negroes from both the grand and petit juries in that *its law required* jury commissioners to select the names of prospective jurors from the books of the county tax receiver which were maintained on a racially segregated basis." 385 U.S., at 546 (emphasis added). The Court stated that "the jury lists for each county *are required by law* to be made up from the tax digest." 385

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capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."

U.S., at 549 (emphasis added), and found that the jury lists "had been made up by reference to . . . the 1964 tax digest which had been prepared from the white and yellow tax return sheets of that year." *Ibid.* (The white tax return sheets designated white taxpayers and the yellow, Negro taxpayers. 385 U.S., at 548.) In this state of the record the Court held that the revised jury list from which the jurors were selected to try the defendant in that case "was suspect because of the system by which it was required to be prepared." 385 U.S., at 551.

> "Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners." 385 U.S., at 552.

The parallels between the Georgia juror-selection system thus condemned and the Arkansas system used in petitioner's case are apparent. Under Arkansas law jurors were required to be selected from electors, whose names were required to be listed in racially designated poll tax books. This requirement without more provides the opportunity for racial discrimination. As the decision in *Whitus* indicates, it is the system which the law requires that makes any action taken under it unconstitutional. Hence, the reliance placed by the Court of Appeals on evidence that "the petit jurors were not selected from . . . [the racially designated elector] lists, although the lists were later checked, as they had to be, in order to determine that the jurors selected were qualified electors" (App. A, p. 52a *infra*), is misplaced. Moreover, even if, under *Whitus*, courts are to look beyond the legally established system for selecting electors, it is clear that the "later check" of the racially designated books, conceded by the court of appeals, provided "the opportunity for discrimination" which

the Constitution condemns.[49] The court of appeals' purported distinction of *Whitus* on the grounds that in Maxwell's case reference was made to the racially designated books only after an initial selection of jurors had been made, cannot stand. In *Whitus* too there was a source for the "revised" jury list independent of the prohibited tax digest—specifically, personal acquaintance of the commissioners with persons in their respective communities.[50]

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[49] The Court observed in *Whitus*:

> "The three jury commissioners who appeared as witnesses testified that they were not aware of the letter 'c' appearing after the names of the Negroes on the 1964 tax digest; that they never included or excluded anyone on the 'revised' jury list because of race or color; that they placed on the 'revised' jury list those persons whom they knew personally from their respective communities; that there were around 600 selected; and that the 'revised' list, which the commissioners themselves prepared, had no designation of race upon it." (385 U.S., at 549.)

Yet despite this testimony, the Court held that the juror-selection system was unconstitutional, because the revised list had been made up "by reference to" an old jury list, previously condemned on racial grounds, and a racially designated tax digest.

The jury commissioners in Maxwell's case also testified that they did not discriminate but did admit that they consulted the tax books to ascertain whether the names they had proposed for jury service appeared in the books. It is obvious that if the commissioners could consult the tax books for this purpose they could consult them also for the purpose of racial exclusion. As Mr. Justice Frankfurter stated in *Avery* v. *Georgia*, 345 U.S. 559 (1953), to which this Court referred in *Whitus* (385 U.S., at 551):

> "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used." (345 U.S., at 564.)

[50] In *Whitus* the Court stated that "The 'revised' jury list was made up from the 1964 tax digest, the old jury list *and the personal acquaintance of the commissioners with persons in their respective communities.*" (385 U.S., at 550; emphasis added.)

As the great bulk of decisions in the jury discrimination field attests, what is determinative of the question of discrimination is not the protestation of innocence by jury officials, nor indeed their good faith, but whether the *system* is one that assures a fair juror selection process. The state must not provide any unnecessary "opportunity to discriminate," cf. *Anderson* v. *Martin*, 375 U.S. 399 (1964), since if the occasion for racial discrimination is present it may be used. This is the teaching of *Whitus*, as evidenced in subsequent applications by this Court. *Bostwick* v. *South Carolina*, 386 U.S. 479 (1967); *Cobb* v. *Georgia*, 389 U.S. 12 (1967); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Anderson* v. *Georgia*, 390 U.S. 206 (1968); *Sullivan* v. *Georgia*, 390 U.S. 410 (1968).

The court below argued further that *Whitus* was distinguishable because of a serious disproportion between Negro population and representation as jurors, whereas "in Maxwell's case . . . we have no question whatsoever of inappropriate Negro representation on the Garland County jury list." (App. A, p. 53a *infra.*) But in *Williams* v. *Georgia*, 349 U.S. 375, 382 (1953), cited in *Whitus*, the Court said:

> "it was the system of selection and the resulting danger of abuse which was struck down in *Avery* and *not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists.*" (Emphasis added)

And the Court in *Whitus* noted that "the circumstances here are akin to those condemned in *Avery* v. *Georgia* . . . ." (385 U.S., at 551.)

A system which requires racial designations in the sources of juror selection, thus offering the opportunity for discrimination, must, under *Whitus*, be condemned. At

the very least, the existence of such a system constitutes, under *Whitus*, a *prima facie* case of discrimination, shifting the burden to the State to show that in fact no discrimination took place. This Court should grant certiorari to consider the propriety of the holdings below that petitioners had not only to prove the existence of a scheme providing the opportunity for discrimination, but, in addition, the actual practice of discrimination.

CONCLUSION

Petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Memorandum Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

PB-66-C-52

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Respondent.

This is a habeas corpus proceeding wherein petitioner, William L. Maxwell, attacks collaterally for the second time his 1962 conviction in the Circuit Court of Garland County, Arkansas, of the crime of forcible rape. The sentence imposed upon him was death, Ark. Stats. Ann., §41-3403.

Petitioner, a Negro man, was charged with raping a 35 year old, unmarried white woman on the night of November 3, 1961. He pleaded not guilty and was tried before a jury. During the trial and during subsequent proceedings in the State court petitioner was represented by capable counsel of his own choice. Following the pronouncement of sentence and entry of judgment by the Circuit Court, petitioner appealed to the Supreme Court of Arkansas where his con-

viction was affirmed. Maxwell v. State, 236 Ark. 694, 370 S. W. 2d 113.

Subsequently, in early 1964 shortly before his scheduled execution petitioner filed in this Court a petition for habeas corpus challenging his conviction and sentence on a number of federal constitutional grounds. The case was assigned to District Judge Gordon E. Young who held a full evidentiary hearing and filed a detailed memorandum opinion denying the petition. Maxwell v. Stephens, E. D. Ark., 229 F. Supp. 205. The Court of Appeals, one judge dissenting, affirmed. Maxwell v. Stephens, 8 Cir., 348 F. 2d 325. In late 1965 the Supreme Court of the United States denied certiorari. Maxwell v. Stephens, 382 U. S. 944.

In due course the Governor of Arkansas scheduled the execution of petitioner for late July 1966; however, the execution was stayed administratively until September 2. That stay is still in effect.

Instant petition was filed on July 21, 1966. On August 5 a pre-trial conference was held, and the case was set for hearing on the merits on August 22. That hearing has been held as scheduled. The Court has given careful consideration to the materials before it, including oral testimony and documentary evidence. This opinion incorporates the Court's findings of fact and conclusions of law.

In the petition now before the Court petitioner alleges certain things that he alleged in his initial habeas corpus action; some things that were alleged in that action are not alleged here;[1] and the present petition contains some allegations that did not appear in the original proceeding.

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[1] Contentions made in the original proceeding and not urged here are: that petitioner was the victim of an unlawful arrest; that there was an unlawful search of petitioner's person and home; that evidentiary material was unlawfully seized in the course of the searches; that petitioner was mistreated physically and that a

Petitioner now contends that racial discrimination was practiced in the selection of the petit jury which tried and convicted him;* that it is unconstitutional to put anyone to death for the crime of rape;* that certain Arkansas statutes to be mentioned dealing with the crime of rape and the punishment to be imposed therefor have been applied unconstitutionally to Negro men convicted of raping white women;* that certain Arkansas statutes dealing with the imposition of the death penalty and certain Arkansas trial procedures in capital cases amount to a denial of due process of law; that petitioner was mentally incompetent to stand trial in the State court, and that his mental condition is now such that it would be unconstitutional to put him to death.[2]

In his pleadings respondent denies that any of petitioner's contentions have merit and, in addition, pleads res judicata, that is to say, respondent asserts that all contentions made here were either raised or could have been raised in the original proceeding in this Court and should not now be considered.

As far as respondent's plea of res judicata is concerned, it is settled that the conventional rule that issues which were litigated or which could have been litigated in an

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confession was extorted from him; that petitioner was tried in a hostile atmosphere. All of those contentions were considered and rejected by Judge Young; not all of them were urged on appeal; those that were were rejected by a majority of the Court of Appeals. This Court considers that all of the contentions not brought forward into this proceeding have been abandoned or that their lack of merit has been established in the original collateral attack on the State court judgment.

[2] The asterisks appearing in text indicate that the contention marked by the asterisk was raised in the original habeas corpus case.

original proceeding will not be again examined in a subsequent proceeding between the same parties or their privies does not apply with strictness to habeas corpus proceedings in the federal courts. Whether a federal court will entertain a successive application for a writ of habeas corpus, and whether and to what extent such a court will consider in connection with a successive petition matters which were or could have been determined in the original proceeding are questions addressed to the sound discretion of the court. See 28 U. S. C. A., §2244; Sanders v. United States, 373 U. S. 1; Simcox v. Harris, 8 Cir., 324 F. 2d 377. Of course, the fact that a specific contention brought forward in a successive application has been considered and rejected in connection with an earlier application is a factor to be considered by the court to which the successive application is addressed.

In this connection the Court in its pre-trial conference order in this case cautioned counsel for petitioner that if they knew of any constitutional grounds for attack on his conviction which had not been raised, such grounds should be brought forward in this proceeding since the Court "would be most reluctant to consider in some subsequent proceeding any grounds of attack which could have been raised in this proceeding." No contentions other than those previously mentioned have been made.

Taking up first the attack on the make-up of the jury, petitioner's complaint is that the Garland County jury commissioners chose the members of the jury panel from tax records identifying poll tax payers by race. That is the same complaint about the jury which was made in the original habeas corpus case, and the record here is the same as the one before the Court in that case. The matter was considered thoroughly by Judge Young and by the Court of

Appeals and, as indicated, the argument was rejected. This Court sees no occasion to reexamine the question and is not persuaded to do so by the action of the Supreme Court in recently granting certiorari in the case of Sims v. Georgia, 384 U. S. 998, noted in 34 U. S. Law Week 3429.

The Court finds it convenient to consider next the contentions with respect to the mental condition of petitioner.

As to the mental condition of petitioner at this time, it was agreed following the pre-trial conference that petitioner would be examined by the staff of the Arkansas State Hospital for Nervous Diseases. The examination was made and petitioner was found to be without psychosis. He thus, in effect, had the benefit of the post-conviction examination contemplated by Ark. Stats. Ann., §43-2622. In addition, at the request of counsel for petitioner he was examined by Dr. William G. Rees, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center. Dr. Rees also found petitioner to be without psychosis. Petitioner was present at the hearing and was observed by the Court; the Court noted no irrationality in petitioner's behavior, and petitioner gave no evidence of present mental incompetency. While the contention has not been abandoned formally, it has not been pressed, and the Court finds it to be without merit.

With respect to petitioner's mental incompetency in 1962 to stand trial for the offense allegedly committed in November 1961, the thrust of the argument seems to be not so much that petitioner was in fact mentally incompetent to stand trial but rather that in the circumstances the Circuit Court was required to make a judicial determination of his competency, that no such determination was made, and that its absence voids the conviction. Pate v. Robinson, 383 U. S. 375; see also United States ex rel. Robinson v. Pate, 7 Cir., 345 F. 2d 691.

The facts in that case were that the defendant, Robinson, was tried to the court without a jury in Illinois on a charge of first degree murder; his defense was insanity, and his mental condition both at the time of the commission of the alleged offense and at the time of trial were directly in issue in the case. He had a long history of behavior indicating serious mental disease; that history was brought out by testimony in the course of the trial, and four witnesses testified that in their opinion defendant was insane. In the course of the trial the prosecuting attorney conceded that there was doubt as to the sanity of the defendant and suggested that a psychiatrist in the employ of Cook County be called as a witness. Notwithstanding the fact that a statute of Illinois provided that whenever the evidence raises a "bona fide doubt" as to a defendant's competency to stand trial, it is the duty of the judge on his own motion to impanel a jury to pass on the question,[3] the trial judge indicated that it was not necessary for the State to call the psychiatrist, did not impanel a jury to consider the question of Robinson's sanity, and found the defendant guilty without making any specific finding as to his competency to stand trial. Both the Court of Appeals and the Supreme Court held that this action amounted to a denial of due process of law.

The facts in this case are quite different from those in *Robinson*. As far as petitioner's mental competency is concerned, the transcript of the proceedings in the Circuit Court reflects the following:

On November 7, 1961, an information was filed by the Prosecuting Attorney charging petitioner with the crime of

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[3] Ill. Rev. Stat., c. 38, §104-2, referred to in the opinions of both the Supreme Court and of the Court of Appeals.

rape committed on November 3. On November 28, 1961, it having been made to appear to the Court that petitioner desired counsel and was without means to employ counsel, an order was entered appointing two members of the Hot Springs, Arkansas Bar to represent petitioner without charge. On November 30 those attorneys proceeding under the provisions of Ark. Stats. Ann., §§43-1301 et seq. filed a petition for an order committing petitioner to the State Hospital for observation and report;[4] on the same day the petition was granted and petitioner was committed for a period of not more than one month. Petitioner was delivered to the Hospital authorities on December 1, and the Hospital staff made its report on December 29.

The Hospital report, signed by Dr. E. W. Crow, the examining physician, and approved by Dr. George W. Jackson, the Hospital superintendent, contained a diagnosis of "without psychosis." The report recited that it was the opinion of the examining physician and of the joint psychiatric staff that petitioner "was not mentally ill, to the degree of legal irresponsibility at the time of this mental examination" and "was probably not mentally ill, to the degree of legal irresponsibility at the time of the alleged commission of his acts."[5]

On January 15, 1962, petitioner, still represented by his appointed attorneys, was arraigned and entered a plea of not guilty. No suggestion was made to the Circuit Judge that petitioner was not mentally competent to plead or to

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[4] The filing of such a petition is not an uncommon practice in Arkansas in cases involving sexual offenses even where there is no real question as to the sanity of the defendant; the request may be made as a precautionary measure or at least as a time gaining device.

[5] The language of the report tracks the language of the statute. See Trotter and Harris v. State, 237 Ark. 820, 822, 377 S.W. 2d 14, ...

stand trial. On February 5 the case was set for trial, but a telegram was received by the Prosecuting Attorney to the effect that Mr. Christopher C. Mercer, Jr., a Negro attorney of Little Rock, had been employed to represent petitioner; accordingly, the setting was cancelled, and the case was passed for the time being. On the same day Mr. Mercer moved for a continuance of the case. That motion was granted, and by agreement the case was set for trial on March 19. At this point in the proceedings petitioner's appointed counsel were permitted to withdraw from the case.

Prior to the trial the Circuit Court was not requested to hold any sanity hearing or to take any testimony as to the mental condition of the accused; insanity was not an issue at the trial. No question of petitioner's mental competency was raised in connection with his appeal to the Supreme Court of Arkansas nor in connection with the original habeas corpus proceeding which he filed in this Court.

Conceding that Pate v. Robinson, supra, emphasizes that it is a denial of due process of law to put a person to trial on a criminal charge when he lacks the mental competency to stand trial, this Court does not believe that that decision or any other decision makes it the constitutional duty of State trial judges to hold sanity hearings on their own motion simply because there has been a routine pre-trial psychiatric examination of the defendant resulting in a negative report.

Certainly, in connection with this successive application for habeas corpus this Court is not willing to hold that the absence of a sanity hearing in the State court deprived petitioner of any federally protected right. It must be remembered that at the trial of the case petitioner was represented by an attorney not only of his own choice but also

of his own race. Presumably, if petitioner had been unable to comprehend the nature of the proceedings, to understand the charges against him, or to communicate intelligently with his attorney relative to his defense, that inability would have manifested itself to counsel prior to or during the trial and counsel would have brought the matter to the trial court's attention.

After petitioner's conviction his attorney filed a long motion for a new trial attacking the conviction on 40 grounds; mental incompetency was not one of them.

In the course of the pre-trial conference in this case, which was attended by Mr. Mercer although he does not represent petitioner in this case, the question of petitioner's mental competency to stand trial was discussed to some extent and nothing was said which would indicate that there is any real basis for belief that petitioner was not mentally competent in 1962. Nor is there anything in the reports of the State Hospital Staff or of Dr. Rees, which would form the basis for such a belief. Petitioner may be of somewhat low mentality, but mere mental weakness is not the equivalent of mental incompetency to stand trial or to be held guilty of a crime.

Before discussing the remaining contentions of petitioner the Court considers it advisable in the interest of precision to make some general comments relative to sentencing procedures in the Arkansas courts.

In all non-capital criminal cases, whether felonies or misdemeanors, which are tried to juries, the jury affirmatively fixes within statutory limits the punishment to be imposed. If the jury agrees that the defendant is guilty but is unable to agree on the punishment, it may, if it desires to do so, return the verdict of guilty and request the judge to fix the punishment.

In capital cases the procedure is somewhat different. Under the substantive criminal code of Arkansas the punishment, and the only punishment, provided for a capital offense, such as first degree murder or rape, is death by electrocution. However, by virtue of Act 187 of 1915, which now appears as Ark. Stats. Ann., §43-2153, a trial jury in a capital case has the right to render a "verdict of life imprisonment in the State penitentiary at hard labor" in lieu of the death penalty. But, if the defendant is found guilty and punishment is not assessed at life imprisonment, the legal penalty is automatically death.

It is thus not correct, strictly speaking, to say that Arkansas juries "impose the death penalty" on anyone. Rather, those juries have the right in a sense to exercise clemency toward particular defendants by assessing the penalty of life imprisonment at hard labor in a capital case.

The Arkansas statutes attacked by petitioner in general and in their application to Negro men convicted of raping white women are Ark. Stats. §41-3403 and §43-2153, read together.

The basic argument that it is unconstitutional to inflict the death penalty upon any person for the crime of rape presents a question of law only which has been ruled upon adversely to petitioner by Judge Young and by the Court of Appeals. A possible variant of that basic argument to the effect that it is unconstitutional to permit a jury of twelve people, with responsibility divided among them, to determine ultimately whether a person convicted of a capital crime shall suffer death or be imprisoned for life is likewise rejected by this Court. If a State can constitutionally impose the death penalty for a crime, this Court sees no constitutional objection to permitting a jury rather than a trial judge to decide whether that penalty shall be imposed

in a particular case. And in this connection it might be pointed out that the obvious purpose of section 43-2153 is to permit juries to extend a degree of mercy to defendants convicted of capital crimes, not to make the assessment of the death penalty easier or more likely.

The argument is made, however, that in any event it is a denial of due process to permit a jury to make its determination solely by the exercise of its collective discretion without standards or guide lines laid down in the statutes, or judicial decisions, or in the instructions of the court.

It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to exercise its discretion in determining whether it should exercise the power conferred upon it by section 43-2153, and it will be assumed that no such standards are to be found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death.[6]

The Court does not think, however, that it is constitutionally necessary for specific standards or guide lines to be laid down or brought to the attention of the jury. Whether a convicted rapist or murderer is to suffer death, on the one hand, or life imprisonment, on the other, rests under Arkansas procedure, within the discretion of the jury, to be exercised in the light of the judgment, common sense, and experience of the jurors. Jurors are presumed

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[6] It does not appear that counsel for petitioner requested any instructions on the subject.

to be persons of good judgment and common sense. If they do not know without being told that in determining whether clemency should be extended in a given case they should take into consideration all of the relevant facts and circumstances shown in evidence and should weigh aggravating circumstances, if any, against mitigating circumstances, if any, no useful purpose will be served by telling them.

On this phase of the case petitioner again relies on a very recent Supreme Court decision. Giaccio v. Pennsylvania, 382 U. S. 399. Again, his reliance is misplaced.

Giaccio involved a peculiar 1860 statute of Pennsylvania which permitted a jury in a misdemeanor case to determine by its verdict whether a defendant acquitted on a misdemeanor charge might nonetheless be taxed with the costs of the prosecution. Giaccio was tried on a misdemeanor charge; the jury found him not guilty but taxed him with the costs. The statute itself prescribed no standards by reference to which the jury was to determine whether an acquitted defendant should be charged with costs. However, Pennsylvania decisions had established that costs were not to be charged against an acquitted defendant unless his conduct had been " 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice,' or that his conduct was 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs' or that though acquitted 'his innocence may have been doubtful.' " 382 U. S. at page 404. The jury was instructed "that it might place the costs of prosecution on the appellant though found not guilty of the crime charged, if the jury found that 'he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of

conviction (and) . . . his misconduct has given rise to the prosecution.'" Ibid.

The trial court ultimately held the statute unconstitutional, but the State appellate courts disagreed. There was an appeal to the Supreme Court of the United States, and that Court held the statute unconstitutionally vague notwithstanding the construction which had been placed upon it by the courts of Pennsylvania. In concurring opinions Justices Stewart and Fortas thought it sufficient to say simply that it is unconstitutional to tax the costs of the prosecution against an acquitted defendant.

Evidently, the majority of the Court were not unmindful that it might be contended that the holding would be used to attack the practice prevailing in many States, including Arkansas, of permitting juries finding defendants guilty to fix the punishments within legal limits. And the Court expressly noted that it intended "to cast no doubt whatever on the constitutionality of (that) practice." 382 U. S. at page 405, f.n. 8.

It is true that in his concurring opinion Mr. Justice Stewart said (p. 405 of 382 U. S.):

> ". . . It seems to me that, despite the Court's disclaimer, much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter. . . ."

Whether the interpretation which Justice Stewart place upon the reasoning of the majority turns out to be accurate

remains to be seen; for the present at least this Court will accept the majority's disclaimer at face value. And, the Court thinks that the Arkansas practice, which has been described, falls within the terms of the disclaimer.

The contention which has been urged most seriously here, and which has been ably argued by Professor Amsterdam of the University of Pennsylvania Law School, who is of counsel in the case, is that Arkansas juries customarily apply Ark. Stats. Ann., §§41-3403 and 43-2153 in a racially discriminatory and unconstitutional manner to Negro men who have been convicted of raping white women so that a disproportionate number of such defendants receive the death penalty. And it is argued that it makes no difference that the sentence results from negative jury action in failing to assess punishment at life imprisonment rather than from affirmative jury action in voting the sentence of death.

The same contention was made in the State courts and, as indicated, was urged before Judge Young and before the Court of Appeals. In those proceedings petitioner sought to establish his thesis by the use of execution records of the State of Arkansas and by records of sentences imposed in rape cases over a period of time in Garland, Pulaski, and Jefferson Counties. The statistics which petitioner was able to produce in the earlier proceedings were not convincing to the Courts concerned.

In the instant case petitioner relies upon the results of a study made in 1965 by Professor Marvin Wolfgang, a well qualified sociologist and criminologist on the faculty of the University of Pennsylvania. Dr. Wolfgang, whose qualifications to testify as an expert are not questioned and are established, testified at the hearing, and a written report prepared by him, together with certain other rele-

vant documentary material, was received in evidence without objection.

The background facts of the Wolfgang study may be summarized as follows:

In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc. to make a study of rape convictions in a number of southern States, including Arkansas to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women.

Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.

As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.

During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men.

No convictions of white men for raping Negro women were found.

Dr. Wolfgang found that of the 34 Negroes convicted of rape 10 had been sentenced to death and 24 had been sentenced to life imprisonment; the corresponding figures for the white offenders were 4 and 17. The witness did not consider that particular variation to be of great significance. But he did attach great significance to the fact that of the 19 Negroes convicted of raping white women 9, or nearly 50 percent, had been sentenced to death, whereas in other racial situations only 5 death sentences had been imposed, those 5 sentences representing only about 14 percent of the total sentences imposed in those situations.[1]

Using recognized statistical procedures Dr. Wolfgang undertook to determine whether the differential in the imposition of the death sentence was due to some factor other than the association between Negro offender and white victim. He concluded, and the Court agrees, that the differential could not be due to the operation of the laws of chance.

The witness then proceeded to consider race in relation to certain variables appearing in rape cases,[2] and also to

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[1] The figures just given relate to convictions and sentences imposed. Actually those figures involve some duplications of individuals. The overall record reflects that two Negroes were convicted twice of raping white victims and received the death sentence each time. One Negro was convicted twice of raping two Negro women and received a life sentence in each case. And two white men were each convicted twice of raping two white women; in each instance the original sentence imposed was life imprisonment, and the second sentence was death.

[2] Generally speaking, and subject to certain exceptions, the variables appear to the Court to be facts or circumstances which reasonably might be supposed to either aggravate or mitigate a given rape. Variables included, but were not limited to, such

consider sentences imposed in relation to such variables. He found that race had significant associations with certain variables but not with others, but he also found that in general the sentences imposed had nothing significant to do with the variables, other than the combination of Negro offenders and white victims.

Without stopping to go into further detail, the Court will state that it understands Dr. Wolfgang's conclusion to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands only about a 14 percent chance of receiving the death sentence.

Petitioner has made no effort here to show that the individual jury which tried and convicted him acted in his particular case with racial discrimination. Rather, petitioner urges that a showing of a pattern of racial discrimination in the imposition of the death penalty makes a prima facie showing of such discrimination in a particular case; that a failure of an Arkansas jury to assess punishment at life imprisonment in a capital case is tantamount to an assessment of the death penalty; and that it is unconstitutional for a jury to permit a death sentence to be imposed on a Negro man convicted of raping a white woman if it would have assessed a penalty of life imprisonment had the defendant been white and had he raped the same woman in the same or similar circumstances.

In appraising petitioner's contention and in weighing the testimony and report of Dr. Wolfgang the Court lays to

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factors as age of defendant, age of victim, degree of force, degree of injury, weapon use or display, and marital and family status of offender and victim.

one side the fact that in Sims v. Georgia, supra, the Supreme Court has agreed to review, among other things, the question of whether a Georgia trial court committed error in refusing to hear testimony to the effect that during a certain period in Georgia 19 times more Negroes than whites have received the death sentence in rape cases. In this case the Court has heard and considered all of the evidence which petitioner has offered.

While the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore the Court is not convinced that it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women or to require or justify the inference that the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment.*

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*Garland County was not included in the sample group of counties considered by Dr. Wolfgang. Garland County statistics were before Judge Young in the original habeas corpus proceedings and were summarized in the opinion of the Court of Appeals. Maxwell v. Stephens, supra, 348 F. 2d at 330. Those figures revealed that in the ten year period beginning January 1, 1954, seven white men and three Negroes were charged with rape in that county. Two of the victims of the white men were white; the races of the other victims of those men were not disclosed. The victims of the Negro offenders were two Negro and one white woman. Charges against four of the white men were not pressed; the other three were convicted of lesser crimes. The charges against one of the Negroes was dismissed, and a second was convicted of a lesser offense. The third, petitioner here, was convicted of raping a white woman and received the death sentence. There is no question that the facts and circumstances surrounding his offense were such as to justify the imposition of that sentence entirely apart from any consideration of race.

The study does not indicate that Negro men convicted of raping white women invariably or even in a majority of cases receive the death penalty. The study covered only 55 cases over a twenty year period in 19 Arkansas counties containing, according to the census of 1960 47 percent of the State's population, and after making allowances for duplications it appears that only 7 Negro men were sentenced to die for raping white women. The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner.

As to the sample which was considered, Dr. Wolfgang said in his report that the included counties "are a stratified random sample of Arkansas counties, geographically dispersed throughout the State and representative of the State in urban-rural and white-Negro population ratios." Although the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically, the quoted statement of Dr. Wolfgang is simply not correct, and this was recognized by Mr. Monroe and is made clear by an examination of a map of the State attached to the report.

The Negro population of Arkansas is not distributed evenly over the State, nor is the State's overall population distributed evenly from the urban-rural standpoint. An examination of the map which has been mentioned shows that the counties included in the sample are for the most part located in the southern and eastern portions of the State where the Negro population is heaviest and include most of the large urban centers in the State such as the Little Rock-North Little Rock metropolitan area, and the cities of Blytheville, El Dorado, Fort Smith, and Pine Bluff.

The variables which Dr. Wolfgang considered are objective; they are broad and in instances are imprecise. In connection with many of the cases studied the field workers were unable to obtain from available sources information which might have been quite pertinent, and Dr. Wolfgang's statistics really reveal very little about the details of the cases of the 7 individual Negroes who received the death sentence for raping white women as compared to the details of the cases in which other racial situations were involved.

Dr. Wolfgang himself recognizes in his report and in his testimony that his conclusions are subject to attack from certain angles due in large measure to the small number of cases studied and lack of available information in many of those cases. In his report he states frankly:

> "This report contains a preliminary analysis of data obtained in a study designed to determine the effect of racial factors upon capital sentencing for rape in the State of Arkansas. The preliminary analysis is neither exhaustive nor conclusive. Its findings, presented below, are tentative and are based upon an exploratory investigation of the available data. Interpreting the results must be done with caution. Subject to this qualification, the preliminary analysis strongly suggests that racial discrimination is operative in the imposition of the death penalty for rape in Arkansas."

On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statis-

tical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that almost anything can be proved by them.

The Court does not intend to belittle either the study made by Dr. Wolfgang or his testimony. But the Court is simply not convinced by them any more than the Supreme Court of Arkansas, Judge Young, and the Court of Appeals were convinced by the materials previously submitted.

In his opinion Judge Young aptly stated that the issue of consent is always involved in rape cases. In cases not involving inter-racial situations the issue of consent may be and frequently is very real; that issue from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men. And the disproportion between death sentences imposed on Negro men convicted in inter-racial cases and such sentences imposed in other cases may well be referable in large measure to the fact that in the former cases the trial jurors may have a firmer and more abiding conviction of the truth of the charges than in cases of the latter type.

The final contention to be discussed does not involve any Arkansas statute but does involve Arkansas criminal procedure generally. Under that procedure the State puts on its evidence first, and in many types of cases, including rape cases, evidence which is relevant to guilt is also relevant to punishment. When the State has completed its presentation, the defense may or may not introduce evidence, and the defendant may or may not testify in his own behalf. If he does testify, he waives his privilege against self-incrimination with respect to the charge against him, and may be cross examined as fully as any other witness. The deliberations of the jury relate to both the

question of guilt and the question of punishment; there is no post-conviction hearing before the jury as to the punishment which the defendant should receive.

Petitioner, who did not take the stand in the course of the trial in the Circuit Court, attacks as unconstitutional the procedure which has been outlined. He alleges that the procedure is unconstitutional because "evidence pertinent to the question of penalty could not be presented without prejudicing the jury against the petitioner on the issue of guilt," and because he could not exercise his constitutional "right of allocution" before the jury which sentenced him, without thereby waiving his privilege against self-incrimination.

In effect, petitioner contends that where a State leaves the matter of punishment to a jury's determination the Constitution requires that the issue of guilt or innocence must be tried out first, and that if the defendant is found guilty, a separate hearing must be held before the jury on the question of punishment in the course of which hearing the defendant can testify as to mitigating circumstances without prejudice to himself since his guilt has been determined already.

While some States follow that procedure, this Court does not believe that the Constitution requires it. The Court does not consider that Jackson v. Denno, 378 U. S. 368 and Malloy v. Hogan, 378 U. S. 1, are in point here.

An order denying the petition will be entered forthwith. This Court will not stay petitioner's execution beyond September 2 and will decline to grant a certificate of probable cause to appeal if such a certificate is requested. Petitioner has ample time to apply to the Court of Appeals for relief.

Dated this 26 day of August, 1966.

J. SMITH HENLEY
United States District Judge

Order of the District Court

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION
PB-66-C-52

WILLIAM L. MAXWELL,
Petitioner,

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,
Respondent.

Pursuant to memorandum opinion filed this date the petition for a writ of habeas corpus filed herein is denied.

Dated this 26 day of August, 1966.

J. SMITH HENLEY
United States District Judge

Opinion of the Court of Appeals

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 18,746

William L. Maxwell,

Appellant,

v.

O. E. Bishop, Superintendent, Arkansas State Penitentiary,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[July 11, 1968.]

Before VOGEL, MATTHES and BLACKMUN, Circuit Judges.

BLACKMUN, Circuit Judge.

William L. Maxwell, a Negro and an Arkansas prisoner under sentence of execution on his 1962 conviction for the state crime of rape, as defined by Ark. Stat. Ann. § 41-3401 (Repl. 1964),[1] petitions a second time for a federal writ

[1] Section 41-3401, as it existed at the time of the offense and Maxwell's conviction, was repealed by Acts 1967, No. 362, § 3, and was replaced by § 1 of the same Act. The new statute separates the crime of rape into third, second, and first degrees. Rape in the first degree is, among other things, sexual intercourse with a female by "forcible compulsion". Rape in the second and third degrees has age conditions. Section 41-3403 which, through § 43-2153, prescribed, upon conviction of rape, a punishment of death or, if the jury chose, life imprisonment, also was, by §§ 3 and 2 of the same 1967 Act, repealed and replaced. The replacement section defines rape as a felony and provides for sentences within prescribed ranges, as to years, for third and second degree rape and, for first degree rape, of "death or thirty (30) years to life imprisonment". If the offense for which Maxwell was convicted had been committed since the effective date of the 1967 Act, it would qualify as rape in the first degree.

of habeas corpus and, with its denial, a second time appeals. The points now urged to us are (1) that a prima facie case of racially discriminatory imposition of the death penalty for rape in Arkansas has now been established and remains unrebutted by the State; (2) that Arkansas' single verdict procedure is without appropriate standards, allows the jury to exercise its discretion irrationally, and is impermissible; and (3) that the decisions of the United States Supreme Court since Maxwell's first federal appeal demonstrate the error of our prior holding, adverse to the petitioner, on the jury selection issue.[2]

We again review the background:

1. The offense for which Maxwell was charged was committed in the early morning of November 3, 1961, in the City of Hot Springs, Garland County, Arkansas. Maxwell, who was 21 at the time, was arrested within two hours after the offense was committed. His convicting jury did not "render a verdict of life imprisonment in the State penitentiary at hard labor", as it had the option to do [since 1915 (Acts 1915, No. 187, § 1, p. 774)] under §§ 43-2153 and 41-3403 and for which it had been given an alternate verdict form. Accordingly, and in line with the interpretation consistently given the statutes by the Supreme Court of Arkansas, *Kelley* v. *State*, 133 Ark. 261, 202 S.W. 49, 54 (1918); *Stewart* v. *State*, 233 Ark. 458, 345 S.W.2d 472, 475 (1961), cert. denied 368 U.S. 935, the trial court imposed the death sentence.

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2 The petition itself also suggests, on information and belief, that Maxwell "is presently insane". At the hearing in the district court, defense counsel acknowledged that "[T]he report [from Dr. William G. Reese, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center] states, in effect, that the petitioner is without psychosis. . . ." The defense's appellate brief recites that the insanity suggestion, "though dealt with by the district court in its opinion, was not pressed below and is not relevant here".

2. Maxwell appealed. On this state appeal he challenged the sufficiency of the evidence; his prosecution by information; the constitutionality in application of the penalty statute, § 41-3403; the denial of his motion that his case be removed to federal court; the overruling of certain objections relating to voir dire; the overruling of objections as to latitude in his cross-examination of witnesses; the admission of evidence; the instructions; and aspects of the prosecution's argument to the jury. All these points were decided adversely to the defense and the judgment of conviction was affirmed by a unanimous Supreme Court of Arkansas (one justice not participating). *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963). No petition for certiorari was filed with the Supreme Court of the United States.[3]

3. Maxwell, with new counsel, then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. In that petition, as twice amended, he alleged the illegality of his arrest; impropriety of the search of his person; impropriety of the search of his home; mistreatment by the police; coerced confessions; an adverse and hostile trial atmosphere; racial discrimination in the selection of his jury; unconstitutional application of § 41-3403; and unconstitutionality of the death penalty for rape. Judge Young decided each point so raised adversely to the defense and denied the petition. His detailed opinion is reported as *Maxwell* v. *Stephens*, 229 F.Supp. 205 (E.D. Ark. 1964).

4. Judge Young, however, granted the certificate of probable cause required by 28 U.S.C. § 2253 and stayed execution. With additional counsel from New York, an appeal

[3] This fact, of course, no longer constitutes a failure to exhaust available state remedies. *Fay* v. *Noia*, 372 U.S. 391, 435-38 (1963); *Curtis* v. *Boeger*, 331 F.2d 675 (8 Cir. 1964).

was taken to this court. We noted that, except for an early period prior to the state trial, when court-appointed attorneys were in the case, Maxwell had been represented through all the state and federal proceedings by competent, although different, non-court-appointed counsel. The points primarily argued to us were three: (1) that Maxwell was denied due process and equal protection because he was sentenced under statutes which are discriminatorily enforced against Negroes; (2) that he was denied due process and equal protection because the Garland County jury lists revealed race and were compiled from racially designated poll tax books; and (3) that the taking of Maxwell's coat and references to it in testimony at the trial violated his Fourth, Fifth and Fourteenth Amendment rights. In what we thought was an opinion meticulously concerned with the several issues raised by Maxwell, we reached the conclusion that Judge Young's decision was correct. *Maxwell* v. *Stephens*, 348 F.2d 325 (8 Cir. 1965). The late Judge Ridge dissented on the search and seizure issue concerning the coat but agreed with all the other conclusions arrived at by the majority.

5. With still another name added to the list of Maxwell's counsel, a petition for certiorari was filed. This was denied, with Mr. Justice Douglas being of the opinion that certiorari should be granted. 382 U.S. 944 (1965).

6. Execution was rescheduled but was stayed administratively until September 2, 1966.

7. Maxwell's second and present petition for a federal writ of habeas corpus was filed July 21, 1966, in the United States District Court for the Eastern District of Arkansas and came before Chief Judge Henley. The court denied the petition. *Maxwell* v. *Bishop*, 257 F.Supp. 710 (E.D. Ark. 1966).

8. The district court and a judge of this court successively declined to grant a stay of the execution or to issue a certificate of probable cause. But the Supreme Court granted leave to file a petition for a writ of certiorari, issued the writ, reversed the denial of the application for the certificate, and remanded the cause with directions to issue it. *Maxwell v. Bishop*, 385 U.S. 650 (1967). Accordingly, the certificate was issued and the execution stayed, and the case is here on appeal.

As we observed before, [pp. 327-28 of 318 F.2d], Maxwell's guilt or innocence is not in issue before us. So far as the details of the crime itself are concerned, we recite only what we said there:

> "The circumstances and details of the crime are, as usual, sordid. They are set forth in the Arkansas opinion, pp. 114-116 of 370 S.W.2d, and need not be repeated here. It suffices only to say that the victim was a white woman, 35 years old, who lived with her helpless ninety-year-old father; that their home was entered in the early morning by the assailant's cutting or breaking a window screen; that in the ensuing struggle the victim bit her assailant and caused bleeding; and that she was assaulted and bruised, her father injured, and the lives of both threatened. Confessions taken from Maxwell were not employed at the trial. The defense presented no evidence. The jury was out several hours. No question is raised as to the sufficiency of the evidence."

The Statistical Argument

Maxwell's present argument that Arkansas discriminates against Negroes in the application of the death penalty for rape, and thus violates the Equal Protection Clause and also 42 U.S.C. § 1981, rests on what is described as newly discovered evidence which became available since

Opinion of the Court of Appeals

this court's disposition of Maxwell's first habeas appeal [illegible] to read, in the words of the petition:

> "This evidentiary complaint consists of the results of a survey of legal considerations during the period [illegible] in a representative sample of nineteen counties comprising more than [illegible] of the population of the State of Arkansas. The survey was conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 75 law students throughout the summer, the expenditure of more than $[illegible] and numerous hours of consultation time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conducted such a study."

The record and the evidence. At a pretrial conference the district court was advised that the evidence to be presented on behalf of Maxwell was that which resulted from the survey and study so described, and that it would be presented through the testimony of Marvin Wolfgang, a criminologist-statistician on the faculty of the University of Pennsylvania. It was agreed in pretrial that the survey [illegible] individual case schedules would be made available for inspection by counsel for the State. The court ruled that, subject to subpoena and to relevancy and materiality, Professor Wolfgang would be permitted to testify as an expert and to introduce his report as a documentary exhibit. The court ruled that objections to uses of the individual case schedules [illegible]. At the evidentiary hearing the State agreed that the basic facts of the schedules, that is, the race of the victim, the race, and sex, of the individual defendant, or the alleged victim, would stand uncontroverted if Wolfgang there was called as a witness.

[illegible]

Dr. Wolfgang possesses the degree of Doctor of Philosophy in Sociology, with Criminology as a sub-field. He is Professor and graduate chairman of the Department of Sociology at the University of Pennsylvania. He is co-director of the Department's Criminological Center. He obviously is a man of scholastic achievement and of experience in his field. The State concedes that his "qualifications as a criminologist have never been questioned by the respondent".

The witness testified that in 1965 he was asked to participate in a study on capital punishment for rape and that this was suggested "as an appropriate topic for research analysis because of the underlying assumption that there is differential imposition of the death penalty in rape cases in certain states". This was to be "an effort to collect the appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption. The ultimate objective of the study was to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements". He was informed that the result might be used in litigation on behalf of defendants who had been convicted and sentenced to death for rape.

The study was carried out in twelve states. One of these was Arkansas. For the State of Arkansas the period investigated was that from January 1, 1945, to the summer of 1965. Not every Arkansas rape case during that period was included but every case which occurred in the sample counties was included.

The study produced 55 rape convictions in the 19 selected Arkansas counties. The witness prepared a preliminary analysis of the data contained in the schedules the student investigators prepared for these cases. Among

the variables considered were race of the defendant, race of the victim, and sentence. The approach was to develop a "null hypothesis" that there is no difference in the distribution of the sentence of death or life imprisonment imposed on negro and white defendants; the calculation of a theoretical frequency, which represents the number of defendants expected to be sentenced to death if the null hypothesis is valid; the comparison of this theoretical frequency with the actual frequency in the collected data for each defendant-victim racial combination; and the determination whether the discrepancy between the expected and the observed frequencies is great enough so that, under accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested rather than of the operation of chance within the testing process. "If that difference reaches a sufficiently high proportion, then the assertion can be made that the difference is significant and could not have occurred by chance."

The data gathering was not limited to the facts of race and sentence. It included other items such as the defendant's age, family status, occupation, and prior criminal record, the victim's age, family status, occupation, husband's occupation, and reputation for chastity; aspects of the prior relationship, if any, between the defendant and the victim; the circumstances of the offense such as the number of offenders and victims, the place, the degree of threat or violence, and the injury inflicted; other offenses contemporaneously committed; the presence of third persons and threats or injury to them; the nature of the intercourse; the involvement of alcohol or drugs; and the circumstances of the trial and post trial proceedings. Data of this general kind were included because they "were felt to be relevant to the imposition of the type of sen-

tence" and "they, rather than race alone, may play a more important role in the disproportionate sentencing to death of Negro defendants convicted of raping white victims". The witness conceded that some data potentially pertinent were not collected as, for example, that "with respect to the strength of the prosecution's case" for "we had no information of that sort that we could objectively collect".

The study disclosed that, in the 55 Arkansas cases, 34 defendants were Negroes and 21 were whites; that 33 had a previous record; that 26 were known to have been in prison; that 39 victims were whites, 15 were Negroes, and the race of one was unknown; that of the victims, two had prior criminal records and 31 did not; that 16 victims had a good reputation for chastity and 6 bad; that 44 received the death sentence and 41 life; that counsel was appointed in 35 cases and retained in 9; that in 23 cases the offender was known by the victim and in 26 he was unknown; that the offender and the victim had had prior sexual relations in 4 cases; and that in 12 cases a plea of guilty was entered.

From this Arkansas data and his study Dr. Wolfgang concluded:

> 1. Factors not significantly associated with either the defendant's race or with the sentence were the place of offense, nature of entry, plea, type of counsel, duration of trial, seriousness of injury to the victim, type of prior relationship between defendant and victim; the defendant's previous record, and the victim's having dependent children.
>
> 2. Factors not significantly associated with the defendant's race were the commission of a contemporaneous offense and previous imprisonment.

3. Factors not significantly associated with the sentences were the defendant's marital status, his age, the victim's age, the display of a weapon, and the defendant's having dependent children.

4. Factors which were significantly associated with sentence were commission of a contemporaneous offense and previous imprisonment.

5. Factors which were significantly associated with the defendant's race were marital status (a greater percentage of Negroes than whites were not married), display of a weapon (more Negroes than white used one), the defendant's age (more Negroes were young), the victim's age (the defendants were white more frequently in the older-defendant-younger-victim combination), and the existence of children dependent on the defendant (more whites had them).

6. An analysis of significant association with defendant's race or the sentence was either unnecessary or not possible with respect to the victim's prior record, her reputation for chastity, the force employed, her pregnancy in the offense, prior sexual relations between the defendant and the victim, and the defendant's assertion of the defense of insanity.

The study covered other items, too, but the analysis was confined to "those particular items in which there was sufficient information to display statistically and to treat statistically".

The witness then further concluded (1) that the critical variables were race of the offender, race of his victim, and sentence; (2) compared to other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death; and (3) "no variable of which analysis was possible could account for the observed disproportionate frequency".

On cross-examination Dr. Wolfgang stated that the Arkansas report was "preliminary" in the sense that the

other states for which data was being collected would be included in the final report; that the 55 Arkansas cases did include some new trials; that, however, he did not think this disturbed his analysis; that he was only "very little" familiar with Arkansas geography; that he was "gratified the report is as good as it is"; that he used such variables as he could get information on; that if he had had more information, he could have used other variables and his report, accordingly, would have been more extensive; that reputation for chastity was presumed to be of some relevance but "unfortunately, there was not enough information upon which to make the analysis complete"; that as a criminologist he was willing to say "that an analysis of a social system—in this case, the judicial system—operated relative to the decision making regarding rape, is such that it casts considerable doubt upon the quality of justice in those particular cases throughout the system"; and that he has never sat on a jury but has been around them.

It was then agreed that among the 55 schedules there were 4 cases which concerned defendants convicted twice for the same rape as a result of a second trial. A fifth case was not one of repeated convictions but, instead concerned two victims.

Received in evidence was an exhibit prepared by the United States Bureau of Prisons. This showed that, for the years 1930-62, 446 persons were executed under civil authority in the United States for rape and that, of these, only 45 were white but 399 were Negro and 2 were of other races, and that, for the same period, 3,298 were executed for murder and, of these, 1,640 were white, 1,619 were Negro, and 39 were of other races.

The petitioner's second and only other witness was John Monroe, a Philadelphia statistician with 17 years'

experience in sampling and surveys. He testified that he was asked by Dr. Wolfgang to design a representative sampling of counties in 12 southern states so that inferences could be drawn for each state and for the region as a whole. Arkansas was included. The 1960 negro population was used as the measure. The sample size was determined largely on speculation as to what area the law students could cover in the time available to them. Nineteen Arkansas counties were selected. These contained more than 47% of the state's population. Mr. Monroe stated that his sample of Arkansas counties was a very reliable one under the restriction, that is, the number of counties that could be investigated during the time allotted. He went on to say that, so far as the sample is concerned, the inferences drawn from it were valid for Arkansas. Garland County was not one of those selected. This was because "the random number just didn't happen to fall in the population for Garland County". Had that county possessed more than 19,000 negro population it would have been selected. The witness conceded that he was sampling the negro population and not the entire population. This was because of the purpose of the study and, in order to compare negro and white cases, the sample has to provide enough of the former to make the findings valid.

The witness stated that he took the total negro population of Arkansas and divided it by the number of draws allocated to the State. This number turned out to be approximately 19,400. A random number between it and zero was selected. As adjacent county negro population added up to the random number plus 19,400, the county was selected. In this way, counties having more than 19,400 Negroes, or approximately that number, were taken consecutively.

On cross-examination it was pointed out that this method did not result in having the selected counties geographically disbursed throughout the State. Instead, the selected counties for the most part were in the east and south. This is where Arkansas' negro population is primarily located.

The court inquired what there was about the survey that gave it validity in Garland County. The answer was that the inferences drawn from the sample were valid for the State of Arkansas. Counsel then observed that it was not Garland County that convicted Maxwell and sentenced him to death but the State, and that the purpose of Mr. Monroe's testimony was to show that the counties selected were representative of the State.

On further cross-examination, the witness acknowledged that the northwestern part of the State was essentially the white population area, that the southeastern portion was the negro population area, and that Garland County was in the white area.

The State offered no evidence.

Such is the record. It is apparent from a reading of the record that the trial court was generous in its rulings on admissibility. Everything which the petitioner presented came in.

The trial court's conclusions on the statistical argument. Chief Judge Henley, in his opinion, pp. 717-21 of 257 F.Supp., described the statistical argument as the "contention which has been urged most seriously here". He referred to Professor Wolfgang as "a well qualified sociologist and criminologist" and to Mr. Monroe as "a qualified statistician". He observed that the investigation showed three categories, namely, rapes of white women

by Negro men, rapes of Negro women by Negro men, and rapes of white women by white men, and that there was no conviction of a white man for rape of a negro woman. He noted that Dr. Wolfgang "concluded, and the Court agrees, that the differential could not be due to the operation of 'the laws of chance'". He characterized Dr. Wolfgang's conclusions "to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands about only a 11 percent chance of receiving the death sentence". He acknowledged that "the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore". Yet he was not convinced that "it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women. . . . The study does not indicate that Negro men convicted of raping white women invariably or even in the majority of cases receive the death penalty. . . . Only 7 Negro men were sentenced to die for raping white women. The case studies, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner". It is not correct, as Dr. Wolfgang said in his report, that the selected Arkansas counties are "representative of the state in urban rural and white Negro population ratios". The statistics "really reveal very little about the details of the cases" where the death sentence was imposed upon Negroes for raping white women as compared with other racial situations. "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases". The

court went on to observe that "In cases not involving inter-racial situations the issue of consent may be and frequently is very real"; but that that issue "is much less likely to be present in cases in which white women have been attacked by Negro men".

The petitioner's argument. The petitioner appellant characterizes the present proceeding as one presenting "for the first time in any appellate court . . . a record which is the end product of a detailed and exhaustive examination of the practical consequences of the procedures used in making the decision whether a man should live or die". It is stated that the question in this record is one of proof, namely, whether the petitioner has made a sufficient showing of racially discriminatory capital sentencing under Arkansas rape statutes. It is pointed out that on three previous occasions, namely, in the Supreme Court of Arkansas, before Judge Young, and in this court, the answer has been in the negative, "notwithstanding that on each successive occasion the evidence tended in the direction of more depth and completeness". This demonstrates, it is said, "how difficult it is for Negro litigants generally and those without means particularly, to make courts see 'the reality of the world, indeed . . . the segregated world' [citing *Brooks* v. *Beto*, 366 F.2d 1, 12 (5 Cir. 1966), cert. denied 386 U.S. 975] . . . in which they live . . . the law [needs to] 'see what all others see' ".

The heart of the petitioner's statistical argument is then forthcoming. It is that on this record the petitioner has made a prima facie case of racial discrimination in sentencing and that he is entitled to prevail when, as here, the State presents no evidence or presents evidence of insufficient moment to overcome the prima facie case so established.

It is said that the Supreme Court of necessity has developed the doctrine that a prima facie showing of unequal racial treatment, calling state procedures in question, compels the inference that the State is drawing the racial line unless it offers justification in non-racial factors for the disproportion. Jury selection and voting deprival cases such as *Hernandez v. Texas*, 347 U.S. 475 (1954), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), are cited generally. Also cited, however, are other cases which, it is said, show that the prima facie approach has not been restricted to jury selection and voting cases. Among these are *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189 (4 Cir. 1966) (reemployment of teachers), and *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4 Cir. 1967) (hospital staff membership). It is argued that there is no reason why the prima facie approach should not be applied to the present case. If there are factors which offset Dr. Wolfgang's expert conclusion, they were in the power of the State to unearth and prove. "Every justification for shifting the burden of persuasion to the State . . . applies with evident force here".

Finally, it is stated that the district court committed manifest error in its evaluation of the evidence. Counsel would dismiss the trial court's observation that the Arkansas figures contained instances of defendants tried more than once on the ground that each Arkansas jury death sentence is an indication of the application of the Arkansas statute. They would dismiss the trial court's concern with the small number of cases on the ground that the whole purpose of the statistical analysis was to satisfy Dr. Wolfgang as an expert and that he was so satisfied and his conclusions are sustainable under accepted scientific standards. They would dismiss the court's concern

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different from the instant case. We are not critical of the death penalty for rape per se to be nullified on constitutional grounds. That step in the first instance is for the Supreme Court and not for this inferior federal court. *See Rudolph v. Peyton*, 336 F.2d 128, 131 (4 Cir. 1964), cert. denied 380 U.S. 923.

The life imprisonment alternative came into the Arkansas statute by Acts 1915, No. 187, § 1, p. 771. In operation it gave the Arkansas jury the power to alleviate punishment and extend clemency in cases (rape being just one of that category) where death had been the only punishment theretofore prescribed. The 1915 statute thus was on the direction of leniency and not away from it. *Kelley v. State*, supra, p. 34 of 202 S.W.2d; *Bell v. State*, 120 Ark. 530, 180 S.W. 186, 190 (1915).

Further, the imposition of punishment by the jury, within statutorily prescribed limits, rather than by the court, is the usual routine in Arkansas criminal procedure. § 43-2145.

We reject the petitioner's argument here for a number of reasons: (a) it has no basis in legislative intent; (b) it would destroy, by indirection, a punishment which the legislature saw fit to impose, which has been a component of the State's criminal law for well over a century, and which in all that time has not been subjected to successful constitutional attack; (c) the defense in Maxwell's rape trial requested no instructional standards; (d) the jury's choice provides room for attention to the very variables which Professor Wolfgang's study concededly did not reach, and (e) we are not convinced that the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally. Juries are not automatons. They are human beings. The jury system

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appropriately assumes that jurors in their factual determinations bring into play their common sense and the experiences of life. Their choice between capital punishment and life imprisonment, as the entire Arkansas method of punishment imposition by the jury, is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is for the judge. See *Witherspoon v. Illinois*, __ U.S. __ (1968).

The authorities proffered by the defense are the well known ones, such as *Herndon v. Lowry*, 301 U.S. 242 (1937), and *Winters v. New York*, 333 U.S. 507 (1948), which deal with vagueness in criminal statutes. But there is nothing vague, and nothing is claimed to be vague, in the substantive provisions of the Arkansas rape statutes. The petitioner's attack is directed to the punishment and not to the crime.

But it is said that *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), "supports, if it does not compel, the conclusion that unfettered jury discretion in capital cases is unconstitutional." *Giaccio* concerned an ancient Pennsylvania statute which permitted a jury to assess costs against a defendant acquitted of a criminal charge and which called for imprisonment if such costs so assessed were not so paid. The Supreme Court held that the statute was invalid under the due process clause "because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs." P. 402. We think that the heart of the holding as to vagueness is that the offending statute "leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." Pp.

for it." The additional argument made in *Giaccio* that state court interpretations provided appropriate standards was also unavailing. At best, these centered generally on "some misconduct" which was "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs."

There is no question as to what is prohibited under the Arkansas rape statute. And the secondary argument in *Giaccio* is a far cry from that Arkansas statute. Of particular import is the Court's footnote 8, p. 403 of 382 U. S., to the effect that in reaching its conclusion that the Pennsylvania statute was invalid, "we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Mr. Justice Stewart, in concurring, p. 405, felt that, despite this disclaimer, much of the reasoning in the opinion served to cast doubt "upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense." No other Justice joined him in that observation. We have no alternative, therefore, except to conclude that footnote 8 means what it says and that the Court did not, by its decision in *Giaccio*, cast doubt upon the constitutionality of a state practice which leaves to juries the power to fix punishment within legally prescribed limits. This thought was specifically applied later in a capital case by the majority opinion in *Spencer v. Texas*, 385 U. S. 554, 564 (1967).[1] We are not impressed with the defense's char-

[1] Nor is it contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case, or to make findings as to whether there was or was not a prior conviction even though enhanced punishment is left to be imposed by the judge. The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases.

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[illegible] a "special reservation of a question" and referable "to jury sentencing and really not capital sentencing".

II. The second aspect of the argument is that the New Jersey single verdict procedure "raises the gravest questions of procedural fairness". The usual points are advanced, namely, the right to allocution, the restriction of this right in single verdict procedure, and the conflict in such procedure between that right and the right not to incriminate oneself. What is suggested is the split verdict procedure.

All these arguments were made and the same cited cases were considered when we heard en banc and decided *Hyde v. United States*, [illegible] (3d Cir. 1967), judgment vacated on other grounds, [illegible] (June 12, 1968). We recognized in that federal case that the issue was not an easy one, that it largely disappears when criminal procedure takes its traditional course and punishment is imposed by the judge rather than by the jury, and that the issue seems to suggest the possibility of the two-stage trial. There, too, as here, no request was made at the district court for a two stage trial. We stated our position and concluded that the unitary trial was not error. We felt justified in that conclusion by the Supreme

[illegible]

Court's remark in *Spencer v. Texas*, supra, p. 568 of 385 U.S.:

> "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

Until the Supreme Court tells us otherwise, we feel that what we said and concluded on this point in *Pope v. United States* has equal application to this state case. We adhere to the result reached on this issue in that en banc decision.

The Jury Selection Argument

This point was made on the first habeas appeal and, although it has not been raised in the state court, it was carefully considered by this court and rejected. Pp. 332-34 of 348 F.2d. The argument urged on that appeal[9] was that in Arkansas at the time of Maxwell's trial petit jurors were selected from electors; electors were persons who had paid the State's poll tax; the official list of a county's poll taxpayers and the poll tax receipts specified race; and the jury list itself indicated race. Ark. Stat. Ann. §§ 39-208, 3-104, 3-118, and 3-227(b).[10]

We reviewed the applicable Supreme Court opinions and our own earlier decisions in *Bailey v. Henslee*, supra, 287 F.2d 936, and *Henslee v. Stewart*, 311 F.2d 691 (8 Cir.

[9] We there noted, p. 332 of 348 F.2d, that on the appeal, in contrast to the situation in the district court, pp. 213-16 of 229 F.Supp., no issue was raised as to deficiencies in the efforts or methods of the jury commissioners as to under-representation of the negro race in the county jury lists, or as to any pattern of negro repeaters on the juries.

[10] Amendment No. 51 to the Arkansas Constitution, known as the "Arkansas Amendment for Voter Registration without Poll Tax Payment," effective except for one minor proviso, January 1, 1965, eliminated the poll tax requirement and with it the color references theretofore appearing in the cited statutes. *See Walker v. State*, 241 Ark. 360, 408 S.W.2d 505, 515, (1966), cert. denied, 386 U.S. 983.

1963), cert. denied 373 U.S. 907, in each of which we had concluded that a prima facie case of limitation in jury selection, because of race, had been established. But we reached the opposite conclusion in Maxwell's first appeal, primarily *because there was no proof whatsoever that the jury list was compiled from the poll tax list.* The evidence was all the other way and uncontradicted, namely, that the list was first *independently* prepared and only then was the poll tax book consulted, as if had to be in order to ascertain that the persons tentatively selected were qualified electors. We felt that we could not say that, because the poll tax receipts and books designated race, it necessarily followed that every jury list in Arkansas was automatically unconstitutional; so to conclude would ignore the possibility of the selection being initially made, as the proof in Maxwell's case showed, wholly apart from the poll tax list." We adhered to this conclusion in the later similar case, on this point, of *Mitchell v. Stephens*, supra, 353 F.2d 129, 133-34.

Presumably, Maxwell and his counsel are not convinced of the rightness of our decision on this point in the first appeal. Nevertheless, the decision was made by a unanimous panel and the Supreme Court did not see fit to disturb it. Having decided the issue, we do not now undecide it in order to reach the opposite result.

The point is repeated, moreover, by Maxwell and counsel on his second habeas petition because, it is said, the granting of certiorari, limited to five questions, in *Sims v. Georgia*, 384 U.S. 908 (1966) (the same day certiorari was denied in *Mitchell v. Stephens*, supra) and the decision in *Whitus v. Georgia*, 385 U.S. 545 (1967), require reversal.

Sims v. Georgia was also an interracial rape case with a Negro as defendant. The fourth question as to which

certiorari was granted related to the constitutionality of a conviction where "local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books", where Negroes comprise only 5% of the jurors selected but about 20% of the taxpayers, and where the defendant offered to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years but his offer was disallowed. Sims' conviction was reversed and his case remanded on the ground that a voluntariness-of-confession issue was controlled by *Jackson* v. *Denno*, 378 U.S. 368 (1964), and that the Supreme Court of Georgia had erred in holding that *Jackson* was not applicable. This was the second of the five certiorari questions. The Supreme Court therefore did not reach any of the issues raised by the other four questions. *Sims* v. *Georgia*, 385 U.S. 538 (1967). The significance of the *Sims* case for Maxwell thus is that the Supreme Court was willing to grant, and did indeed grant, certiorari on a question related to racially segregated tax books, the selection of jurors from such books, the misproportion of negro jurors to negro taxpayers, and a disallowed offer of proof of arbitrary and systematic exclusion for ten years.

Merely stating the question reveals the inapplicability of the fourth Sims question to Maxwell's case. It is true that at the time of Maxwell's trial, as we have repeatedly noted, Arkansas procedure called for racially designated elector lists. But as has already been pointed out, the uncontradicted proof in Maxwell's case was that the petit jurors were not selected from those lists, although the lists were later checked, as they had to be, in order to determine that the jurors selected were qualified electors. There is no assertion here of misproportion of negro jurors

to negro taxpayers or negro electors or negro citizens. And there is nothing before us by way of claim of systematic negro exclusion on Garland County jury lists for any period of time.

Similarly, we fail to see where *Whitus* v. *Georgia* and subsequent rulings based on *Whitus*, namely, *Bostick* v. *South Carolina*, 386 U.S. 479 (1967); *Cobb* v. *Georgia*, 389 U.S. 12 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967); *Sims* v. *Georgia*, 389 U.S. 404, 407-08 (1967); see *Coleman* v. *Alabama*, 389 U.S. 22 (1967), afford anything new or anything not fully discussed and fully decided on Maxwell's prior habeas appeal. The Georgia jury lists, under attack in *Whitus*, were made up from a racially designated tax digest and by reference to the old jury list theretofore condemned in *Whitus* v. *Balkcom*, 333 F.2d 496 (5 Cir. 1964), cert. denied 379 U.S. 931. And again there was serious disproportion of negro representation. The Court quite expectedly held that such proof constituted a prima facie case of purposeful discrimination, for the fact situation fell in line with that in *Avery* v. *Georgia*, 345 U.S. 559 (1953), cited by the Supreme Court and also by us on the first appeal, p. 332 of 348 F.2d. A construction, for Maxwell's case, of footnote material similar to that found in *Jones* v. *Georgia*, supra, at p. 25 of 389 U.S., would be contrastingly revealing. In Maxwell's case, we repeat, we have no question whatsoever of inappropriate negro representation on the Garland County jury list, we have a negro commissioner, and we have jury lists independently prepared prior to the statutorily required reference to the poll tax rolls. The jury list, thus, was not prepared from condemned or racially designated lists. The petitioner's position here would render it impossible to try a negro defendant for any crime in the State of Arkansas prior to the adoption of Amendment No. 51. On the facts such a stricture is not constitutionally required.

Sims and *Whitus* therefore fail to afford reversing precedent.

Although the point has not been raised to us, a comment relative to the Supreme Court's recent decision in *United States* v. *Jackson*, ... U.S. ... (1968), may be indicated. In *Jackson* the Court held unconstitutional the death penalty provision of the Federal Kidnaping Act, 18 U.S.C. § 1201(a). Does that holding suggest the constitutional invalidity of the Arkansas death penalty for rape, under the Fifth and Sixth Amendments which now, through the Fourteenth, have an area of application to the states? See *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

We readily conclude that *Jackson* does not require a holding of invalidity of the Arkansas death penalty. *Jackson*, as we read the opinion, pivoted on the fact that the defendant's assertion of his right to a jury trial might cost him his life, "for the federal statute authorizes the jury—and only the jury—to return a verdict of death" and thus subjects the defendant who does not plead guilty and who asks for a jury trial to the hazard of capital punishment. The Arkansas rape punishment situation is not the same. As we have pointed out above, the Arkansas procedure in criminal cases is for the jury to affix the punishment within the limits statutorily defined. § 43-2145. Although § 43-2306 provides that when a jury fails to agree on the punishment or to declare the punishment in their verdict or if they assess punishment not authorized by law, "and in all cases of a judgment on confession", the court shall assess and declare the punishment. But § 43-2108 states that a trial by jury may be waived "except where a sentence of death may be imposed". And the Supreme Court of Arkansas has spe-

cifically held in a rape case, where the defendant had entered a plea of guilty, that it was mandatory to impanel a jury to fix the punishment. *Scarber* v. *State*, 226 Ark. 503, 291 S.W.2d 241, 243 (1956). Thus, in contrast to the Federal Kidnaping Act, an Arkansas defendant, by entering a plea of guilty in a capital case, does not avoid a trial by jury on the issue of punishment. The critical choice under the federal act which occasioned the result in *Jackson*, is thus not present under the Arkansas statutes.

It is obvious, we think, that the efforts on behalf of Maxwell would not thus be continuing, and his case reappearing in this court were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind particularly excruciating for the author of this opinion[11] who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary. We note, for what that notice may be worth, that the death penalty for rape remains available under federal statutes. 18 U.S.C. § 2031; 10 U.S.C. § 920(a).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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11 Judges Vogel and Matthes do not join in this comment.

Judgment of the Court of Appeals

(Filed July 11, 1968)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,746

SEPTEMBER TERM, 1967

WILLIAM L. MAXWELL,

Appellant.

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court of August 26, 1966, denying Petition for Writ of Habeas Corpus in this cause be, and the same is hereby, affirmed.

July 11, 1968

Order entered in accordance with Opinion:—

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit

APPENDIX B

Constitutional and Statutory Provisions Involved

ARKANSAS STATUTES ANNOTATED, §3-118 (1956):

3-118. *List of poll tax payers furnished county clerk and election commissioners.*—Not later than the 15th day of October of each year the collector shall file with the county clerk a list containing the correct names, alphabetically arranged (according to the political or voting townships, and according to color) of all persons who have up to and including October 1st of that year paid the poll tax assessed against them respectively. The correctness of this list shall be authenticated by the affidavit of the collector in person. The county clerk shall at once record the said list in a well bound book to be kept for that purpose....

ARKANSAS STATUTES ANNOTATED, §3-227 (1956):

3-227. *Evidence of right to vote—Filing and return of documents—Additional list of voters—Poll tax receipts, requirements—Certified poll tax lists—Rejection of ballots.*—No person shall be allowed to vote at any primary election held under the laws of this State, who shall not exhibit a poll tax receipt, or other evidence that he has paid his poll tax within the time prescribed by law to entitle him to vote at the succeeding general State election. Such other evidence shall be:

(a) A copy of such receipt duly certified by the clerk of the county court of the county where such tax was paid.

(b) Or, such person's name shall appear upon the list required to be certified to the judges of election by section three of Act 320 of Acts of 1909 [§3-118].

Or, if any person offering to vote shall have attained the age of twenty-one [21] years since the time of assessing taxes next preceding such election, which period of assessment is here declared to mean between the second Monday in May and the second Monday in September of each year, and possesses the other necessary qualifications, and shall submit evidence by written affidavit, satisfactory to the judges of election, establishing that fact, he shall be permitted to vote.

All such original and certified copies of poll tax receipts and written affidavits shall be filed with the judges of election and returned by them with their other returns of election, and the said judges of election shall, in addition to their regular list of voters, make an additional list upon their poll books of all such persons permitted by them to vote, whose names do not appear on the certified list of poll tax payers, and such poll books shall have a separate page for the purpose of recording names of such persons.

It shall be the duty of each elector, at the time of payment of his poll tax, to state, and it shall be the duty of the collector to record and certify in his receipt evidencing the payment of such poll tax, the color, residence, postoffice address (rural route, town or street address), voting precinct, and school district, of such person at the time of the payment of such tax, and all poll tax receipts not containing such requirements shall be void and shall not be recognized by the judges of election; provided, however, it shall not be necessary to state or have certified the street address of any such person in cities and towns where the numbering of houses is not required by the ordinances thereof.

The certified lists required by section 3 of Act 320 of 1909 [§3-118] shall contain, in addition to the name of the person paying such poll tax, his color, residence, post-

office address (rural route, town, or street address where by ordinance the numbering of houses is required), the school district and voting precinct, and such list shall be arranged in alphabetical order, according to the respective voting precincts. The county election commissioners shall supply the judges of primary elections with printed copies of such lists....

ARKANSAS STATUTES ANNOTATED §39-208 (1962):

Preparation of lists of petit jurors and alternates—Indorsement of lists.—The commissioners shall also select from the electors of said county, or from the area constituting a division thereof where a county has two [2] or more districts for the conduct of circuit courts, not less than twenty-four (24) nor more than thirty-six (36) qualified electors, as the court may direct, having the qualifications prescribed in Section 39-206 Arkansas Statutes 1947 Annotated to serve as petit jurors at the next term of court; and when ordered by the court, shall select such other number as the court may direct, not to exceed twelve [12] electors, having the same qualifications, for alternate petit jurors, and make separate lists of same, specifying in the first list the names of petit jurors so selected, and certify the same as the list of petit jurors; and specifying in the other list the names of the alternate petit jurors so selected, and certifying the same as such; and the two [2] lists so drawn and certified, shall be enclosed, sealed and indorsed "lists of petit jurors" and delivered to the court as specified in Section 39-207, Arkansas Statutes 1947, Annotated for the list of grand jurors.

Constitutional and Statutory Provisions Involved

ARKANSAS STATUTES ANNOTATED §41-3403 (1962):

41-3403. *Penalty for Rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment]. [Act Dec. 14, 1842, §1, p. 19; C. & M. Dig., §2719; Pope's Dig., §3405.]

ARKANSAS STATUTES ANNOTATED §43-2153 (1962):

43-2153. *Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor.